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and

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This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 24

(T.D. 01–34)

RIN 1515–AC82

AMENDED PROCEDURE FOR REFUNDS OF HARBOR MAINTENANCE FEES PAID ON EXPORTS OF MERCHANDISE

AGENCY: Customs Service, Department of the Treasury.

ACTION: Interim regulations; correcting amendment.

SUMMARY: This document contains corrections to the interim regulations (T.D. 01–25), which were published in the Federal Register on March 28, 2001. The interim regulations provide a new procedure for requesting refunds of harbor maintenance fees that were paid on exports. The correction involves the address to which refund requests for all quarterly paid harbor maintenance fees must be sent.

DATES: Effective on March 28, 2001.

FOR FURTHER INFORMATION CONTACT: Deborah Thompson, Accounts Receivable Branch, Accounting Services Division, (317) 298–1200 (ext. 4003)

SUPPLEMENTARY INFORMATION:

BACKGROUND

Interim regulations providing a new procedure for requesting refunds of harbor maintenance fees that were paid on exports were published as T.D. 01–25 in the Federal Register (66 FR 16854) on Wednesday, March 28, 2001. The interim regulation amended § 24.24(e)(4), Customs Regulations (19 CFR 24.24(e)(4)). An error was contained in paragraphs (e)(4)(i) and (e)(4)(ii)(A) of § 24.24 regarding the zip code in the address to send requests for refunds for harbor maintenance fees paid on both export and non-export movements. This document corrects that error. The correct address to send requests for quarterly paid harbor maintenance fee refunds is: U.S. Customs Service, HMT Refunds, 6026 Lakeside Blvd., Indianapolis, IN 46278.

LIST OF SUBJECTS IN 19 CFR PART 24

Accounting, Claims, Customs duties and inspection, Fees, Financial and accounting procedures, Imports, Taxes, User Fees.

AMENDMENT TO THE REGULATIONS

For the reasons stated in the preamble, part 24 of the Customs Regulations (19 CFR part 24) is corrected as follows:

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The authority citation for part 24 continues to read in part as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58a–58c, 66,1202 (General Note 22, Harmonized Tariff Schedule of the United States), 1505, 1624; 26 U.S.C. 4461, 4462; 31 U.S.C. 9701.

* * * * * * *

2. In § 24.24(e)(4)(i), the third sentence is revised to read as follows: "A refund request should be mailed to: U.S. Customs Service, HMT Refunds, 6026 Lakeside Blvd., Indianapolis, Indiana 46278."

3. In § 24.24(e)(4)(ii)(A), the first sentence is revised to read as follows: "For export fee payments made prior to July 1, 1990, the exporter (the name that appears on the SED or equivalent documentation authorized under 15 CFR 30.39(b)) or its agent must submit a letter of request for a refund to the U.S. Customs Service, HMT Refunds, 6026 Lakeside Blvd., Indianapolis, IN 46278, specifying the grounds for the refund and identifying the specific payments made."

Dated: April 23, 2001.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Federal Register, April 27, 2001 (66 FR 21086)]

19 CFR Parts 132 and 163

(T.D. 01–35)

RIN 1515–AC83

LICENSES FOR CERTAIN WORSTED WOOL FABRICS SUBJECT TO TARIFF-RATE QUOTA

AGENCY: U.S. Customs Service, Department of The Treasury.

ACTION: Interim rule; solicitation of comments.

SUMMARY: This document amends the Customs Regulations on an interim basis to set forth the form and manner by which an importer establishes that a valid license, issued under regulations of the U.S. Department of Commerce, is in effect for certain worsted wool fabric that is the subject of a tariff-rate quota. Such a license is necessary in order to enable the importer to claim the in-quota rate of duty on the worsted wool fabric.

DATES: Interim rule effective on May 1, 2001. The interim rule is applicable to products that are entered, or withdrawn from warehouse, for consumption on or after May 1, 2001. Comments must be received on or before July 2, 2001.

ADDRESSES: Written comments may be addressed to and inspected at the Regulations Branch, U.S. Customs Service, 1300 Pennsylvania Avenue, NW., 3rd Floor, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Erin Riley, Office of Field Operations, (202–927–5395).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Under section 501 of the Trade and Development Act of 2000 (the "Act") (Pub. L. 106–200, 114 Stat. 251; May 18, 2000), the Harmonized Tariff Schedule of the United States (HTSUS) was amended to establish a tariff-rate quota for certain worsted wool fabrics that are entered or withdrawn from warehouse for consumption, on or after January 1, 2001.

Generally, under a tariff-rate quota, the United States applies one tariff rate, known as the in-quota rate, to imports of a product up to a particular amount, known as the in-quota quantity, and another, higher rate, known as the over-quota rate, to imports of a product in excess of the given amount. The preferential, in-quota rate would be applicable to the product only to the extent that the aggregate in-quota quantity of the product that is entered or withdrawn for consumption is not exceeded during the quota year.

To establish the tariff-rate quota for worsted wool fabrics, subchapter 2 of Chapter 99, HTSUS, was amended by section 501(a) and (b) of the

Act to add two new subheadings, 9902.51.11 and 9902.51.12, respectively.

The two new subheadings created by section 501(a) and (b) of the Act describe certain fabrics of worsted wool provided for in subheadings 5111.11.70, 5111.19.60, 5112.11.20 and 5112.19.90, HTSUS. Since the passage of the Act, the President issued Presidential Proclamation 7383 (December 1, 2000). The Annex to that Presidential Proclamation provided, in pertinent part, for the following HTSUS substitutions, effective on or after January 1, 2001:

Subheading 5112.11.20 is replaced by subheadings 5112.11.30 and 5112.11.60; and

Subheading 5112.19.90 is replaced by subheadings 5112.19.60 and 5112.19.95.

Further, it is noted that HTSUS subheadings 5111.11.70 and 5111.19.60 do not provide for worsted wool fabric so fabrics described in those subheadings would not meet the description of fabrics that could fall under the tariff rate quota.

Accordingly, the tariff rate quota is applicable to certain fabrics of worsted wool provided for in subheadings 5112.11.30, 5112.11.60, 5112.19.60 and 5112.19.95, HTSUS, that are described in and entered under subheadings 9902.51.11 and 9902.51.12, HTSUS.

NEED FOR TARIFF-RATE QUOTA FOR WORSTED WOOL FABRICS

Worsted wool fabrics as described in HTSUS subheadings 5112.11.30, 5112.11.60, 5112.19.60 and 5112.19.95 are subject to a duty rate of 28.3% ad valorem. However, articles, such as men's suits, that are made (cut and sewn) from this fabric, are dutiable at the lower rate of 18.8% ad valorem.

By applying a higher tariff rate to the input product, *i.e.*, the worsted wool fabric, than to the more labor-intensive and higher-value-added apparel items that are made from the fabric, the tariff schedule in effect provides an incentive for the importation of the finished apparel items at the lower rate of duty, to the competitive detriment of U.S. suit-makers. Furthermore, this tariff inversion is compounded by the additional reduction in tariffs on men's wool suits that are made in Canada or Mexico pursuant to the North American Free Trade Agreement Implementation Act (NAFTA) (Pub. L. 103–182; December 8, 1993). In this latter instance, U.S. suit-makers face greater competitive disadvantage due to the increased difference in tariff between the worsted wool fabric relative to the free rate of duty on imports of such suits under NAFTA.

Consequently, under the tariff-rate quota adopted in this case, the tariff on imported worsted wool fabric entered under HTSUS subheading 9902.51.11 or 9902.51.12 (which includes certain fabric of worsted wool provided for in HTSUS subheadings 5112.11.30, 5112.11.60, 5112.19.60 and 5112.19.95) is reduced in an effort to limit the above-described tariff inversion, and the resultant competitive disadvantage, faced by U.S. suit-makers in the purchase of such fabric that is intended

for use in the manufacture of men's and boys' suits, suit-type jackets and trousers.

APPLICATION OF TARIFF-RATE QUOTA UNDER HTSUS SUBHEADINGS 9902.51.11 AND 9902.51.12

Specifically, under subheading 9902.51.11, which covers those worsted wool fabrics having an average fiber diameter greater than 18.5 micron, the applicable tariff rate is reduced from the current rate of 28.3% ad valorem to the rate in effect for worsted wool suit-type jackets in HTSUS subheading 6203.31.00 (currently, 18.8% ad valorem); and, under subheading 9902.51.12, which covers those worsted wool fabrics having an average fiber diameter of 18.5 micron or less, the applicable tariff rate is reduced from the current U.S. rate of 28.3% to a rate equivalent to the Canadian "most favored nation" (MFN) rate for imports of such fabric (currently, 6%).

Both subheadings 9902.51.11 and 9902.51.12 also require that the worsted wool fabric be certified by the importer as being suitable for use in making suits, suit-type jackets, or trousers.

This tariff-rate quota for worsted wool fabric is to be in effect for calendar years 2001, 2002 and 2003. The quota year is thus the calendar year (from January 1—December 31, inclusive) in which the subject fabric is entered or withdrawn for consumption.

The in-quota quantities of worsted wool fabric entered under HTSUS subheading 9902.51.11 or 9902.51.12 that are eligible for the reduced tariffs for each quota year are limited, respectively, to 2.5 million square meter equivalents and 1.5 million square meter equivalents (U.S. Notes 15 and 16 to subchapter II of Chapter 99, HTSUS, respectively, as amended by section 501(d) of the Act). These in-quota quantities may be adjusted on an annual basis as provided in section 504(b) of the Act.

ADMINISTRATION OF TARIFF-RATE QUOTA BY U.S. DEPARTMENT OF COMMERCE

In implementing the in-quota limits on the quantities of worsted wool fabric that may be entered or withdrawn for consumption subject to the reduced tariffs afforded by subheadings 9902.51.11 and 9902.51.12, the U.S. Department of Commerce has been delegated the authority under section 501(e) of the Act to fairly apportion these in-quota quantities among those persons, including firms, corporations and other legal entities, in the United States, who cut and sew men's and boys' worsted wool suits, suit-type jackets and trousers. This delegation of authority to the Department of Commerce was effected by Presidential Proclamation No. 7383 (December 1, 2000).

Accordingly, the Department of Commerce has issued regulations setting up a program for the allocation of the aggregate in-quota quantity established, respectively, for subheadings 9902.51.11 and 9902.51.12 (15 CFR 335.1–335.7; see Federal Register dated January 22, 2001 (66 FR 6459)).

In pertinent part, under this program, the usage of the quota is allocated to U.S. suit-makers by virtue of licenses issued to them by the De-

partment of Commerce. Each license is issued for a stated quantity of fabric and is required to have a unique control number. A suit-maker who has been issued such a license (a licensee) may enter worsted wool fabric under subheading 9902.51.11 or 9902.51.12 at the related in-quota rate of duty, up to the amount authorized in the license.

However, if the importer of record is not the licensee, the importer must have received an authorization from the licensee to act on its behalf, in order to be entitled to the in-quota rate of duty. The licensee may only authorize an importer to import fabric under the license on its behalf by making such an authorization in writing or by an electronic notice to the importer and by providing a copy of such authorization to the Department of Commerce. This authorization must include the unique control number of the license; it must specifically cover the fabric being imported; and it must be in the possession of the importer at the time of filing the entry summary or warehouse withdrawal for consumption (Customs Form 7501), or its electronic equivalent, in order for the importer to be eligible for the applicable in-quota rate of duty.

A licensee may only withdraw an authorization from an importer by notifying the importer in writing or by electronic notice and by providing a copy of this withdrawal notification to the Department of Commerce. It is the responsibility of the licensee to safeguard the use of the license issued. Neither the Department of Commerce nor Customs is liable for any unauthorized or improper use of the license.

CORRESPONDING CUSTOMS RULEMAKING

In accordance with the rulemaking of the Department of Commerce, Customs is issuing this interim rule in order to set forth a new § 132.18, Customs Regulations (19 CFR 132.18), that prescribes the form and manner by which an importer establishes that a valid license exists for worsted wool fabric subject to the tariff-rate quota that is entered under HTSUS subheading 9902.51.11 or 9902.51.12. In particular, the unique control number assigned to the license must be referenced on the entry summary or warehouse withdrawal for consumption, or its electronic equivalent, in order to entitle the importer to claim the in-quota rate of duty on the worsted wool fabric.

Section 132.18 also makes clear that by claiming the in-quota rate of duty for worsted wool fabric that is entered under HTSUS subheading 9902.51.11 or 9902.51.12, the importer is thus certifying that the worsted wool fabric is suitable for use in making suits, suit-type jackets, or trousers, as required under these subheadings.

In addition, this document revises the Interim (a)(1)(A) List set forth as an Appendix to part 163, Customs Regulations (19 CFR part 163, Appendix) to make reference to the license or written authorization required under new § 132.18. The (a)(1)(A) List provides a listing of the records and information required for the entry of merchandise.

COMMENTS

Before adopting this interim regulation as a final rule, consideration will be given to any written comments that are timely submitted to Customs. Customs specifically requests comments on the clarity of this interim rule and how it may be made easier to understand. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, U.S. Customs Service, 1300 Pennsylvania Avenue, NW., 3rd Floor, Washington, D.C.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS, THE REGULATORY FLEXIBILITY ACT, AND EXECUTIVE ORDER 12866

Pursuant to the provisions of 5 U.S.C. 553(b)(B), Customs has determined that good cause exists for dispensing with prior public notice and comment procedures for this interim rule. This interim rule implements a preferential tariff benefit in favor of the importing public; it provides a necessary and reasonable means for carrying out this preferential tariff benefit; and it closely parallels existing regulatory provisions that implement similar trade preference programs. Also, for these same reasons, there is no need for a delayed effective date under 5 U.S.C. 553(d). Because no notice of proposed rulemaking is required for interim regulations, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. Nor does this document meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

PAPERWORK REDUCTION ACT

The collections of information involved in this interim rule have already been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) and assigned OMB Control Numbers 1515–0065 (Entry summary and continuation sheet) and 1515–0124 (General recordkeeping and record production requirements). This rule does not make any material change to the existing approved information collections.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB.

LIST OF SUBJECTS

19 CFR Part 132

Customs duties and inspection, Quotas, Reporting and recordkeeping requirements.

19 CFR Part 163

Administrative practice and procedure, Customs duties and inspection, Imports, Reporting and recordkeeping requirements.

AMENDMENTS TO THE REGULATIONS

Accordingly, parts 132 and 163, Customs Regulations (19 CFR parts 132 and 163), are amended as set forth below.

PART 132—QUOTAS

1. The general authority citation for part 132 continues to read, and the specific sectional authority under this part is revised to read, as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 22, Harmonized Tariff Schedule of the United States (HTSUS)), 1623, 1624.

§§ 132.15 through 132.18 also issued under 19 U.S.C. 1202 (additional U.S. Note 3 to Chapter 2, HTSUS; subchapter III of Chapter 99, HTSUS; additional U.S. Note 8 to Chapter 17, HTSUS; and subchapter II of Chapter 99, HTSUS, respectively), 1484, 1508.

2. Part 132 is amended by adding a new § 132.18 to read as follows:

§ 132.18 License for certain worsted wool fabric subject to tariff-rate quota.

(a) *Requirement.* For worsted wool fabric that is entered under HTSUS subheading 9902.51.11 or 9902.51.12, the importer must possess a valid license, or a written authorization from the licensee, pursuant to regulations of the U.S. Department of Commerce (15 CFR 335.5), in order to claim the in-quota rate of duty on the worsted wool fabric at the time it is entered or withdrawn from warehouse for consumption. The importer must record the distinct and unique 9-character number for the license covering the worsted wool fabric on the entry summary or warehouse withdrawal for consumption (Customs Form 7501, column 34), or its electronic equivalent (see paragraph (c)(1) of this section).

(b) *Importer certification.* By entering the worsted wool fabric under HTSUS subheading 9902.51.11 or 9902.51.12, the importer thus certifies that the worsted wool fabric is suitable for use in making suits, suit-type jackets, or trousers, as required under these subheadings.

(c) *Validity of license.* (1) *License number.* To be valid, the license, or written authorization issued under the license and including its unique control number, must meet the requirements of 15 CFR 335.5, and with respect to the requirement in 15 CFR 335.5(a) that the license have a unique control number, the license must have a distinct and unique identifying number consisting of 9 characters comprised of the following three elements:

(i) The first character must be a "W";

(ii) The second and third characters must consist of the last 2 digits of the calendar year for which the license is issued and during which it is in effect; and

(iii) The final 6 characters represent the distinct and unique identifier assigned to the license by the Department of Commerce.

(2) *Use of license.* A license covering worsted wool fabric that is entered under HTSUS subheading 9902.51.11 or 9902.51.12 is in effect,

and may be used to obtain the applicable in-quota rate of duty for fabric that is entered or withdrawn for consumption, only during the specific calendar year (January 1—December 31, inclusive) for which the license is issued (see 15 CFR 335.2 and 335.5(b) and (d)).

(d) *Retention and production of license or authorization to Customs.* The license and any written authorization from the licensee to the importer are subject to the recordkeeping requirements of part 163 of this chapter (19 CFR part 163). Specifically, the license and any written authorization must be retained for a period of 5 years in accordance with § 163.4(a) of this chapter, and must be made available to Customs upon request in accordance with § 163.6(a) of this chapter.

PART 163—RECORDKEEPING

1. The authority citation for part 163 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1484, 1508, 1509, 1510, 1624.

2. The Appendix to part 163 is amended by adding the following new listing under section IV in appropriate numerical order to read as follows:

APPENDIX TO PART 163—INTERIM (a)(1)(A) LIST

* * * * * * *

IV. * * *

§ 132.18 License, or written authorization, as applicable, for worsted wool fabric subject to tariff-rate quota

* * * * * * *

CHARLES W. WINWOOD,
Acting Commissioner of Customs.

Approved: April 9, 2001.

TIMOTHY E. SKUD,
Acting Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, May 1, 2001 (66 FR 21664)]

19 CFR Part 102

(T.D. 01–36)

RIN 1515–AC80

RULES OF ORIGIN FOR TEXTILE AND APPAREL PRODUCTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim rule; solicitation of comments.

SUMMARY: This document amends the Customs Regulations on an interim basis to align the existing country of origin rules for textile and apparel products with the statutory amendments to section 334 of the Uruguay Round Agreements Act, as set forth in section 405 within Title IV of the Trade and Development Act of 2000. Section 405 clarifies the text of section 334 by redesignating certain provisions and amends the processing operations required to confer country of origin status to certain textile fabrics and made-up articles. This document implements the statutory changes.

DATES: This interim rule is effective May 1, 2001. Comments must be received on or before July 2, 2001.

ADDRESS: Written comments (preferably in triplicate) may be submitted to and inspected at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., 3rd Floor, Washington, D.C. 20229.

FURTHER INFORMATION CONTACT: Cynthia Reese, Textile Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, NW, Washington, DC, 20229, Tel. (202) 927–1361.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 334 of the Uruguay Round Agreements Act (URAA), Public Law 103–465, 108 Stat. 4809 (19 U.S.C. 3592), directs the Secretary of the Treasury to prescribe rules implementing certain principles for determining the origin of textiles and apparel products. Section 102.21 of the Customs Regulations (19 CFR 102.21) implements section 334 of the URAA.

On May 18, 2000, President Clinton signed into law the Trade and Development Act of 2000 (the Act), Public Law 106–200, 114 Stat. 251. Section 405 of Title IV of the Act amends section 334 of the URAA. Specifically, section 405(a) amends section 334(b)(2) of the URAA by redesignating paragraphs (b)(2)(A) and (B) as paragraphs (b)(2)(A)(i) and (ii), and by adding two special rules at new paragraphs (b)(2)(B) and (C) that change the rules of origin for certain fabrics and made-up textile products.

Under section 334, certain fabrics, silk handkerchiefs and scarves were considered to originate where the base fabric was knit or woven, notwithstanding any further processing. As a result of the statutory amendment to section 334 effected by section 405 of the Act, the processing operations which may confer origin on certain textile fabrics and made-up articles are changed to include dyeing, printing, and two or more finishing operations. In particular, the amendment to section 334 affects the processing operations which may confer origin on fabrics classified under the Harmonized Tariff Schedule of the United States (HTSUS) as of silk, cotton, man-made fibers or vegetable fibers.

Section 405(b) provides that the amendments to section 334 apply to goods entered, or withdrawn from warehouse for consumption, on or after May 18, 2000.

AMENDMENT TO THE CUSTOMS REGULATIONS

As the statutory amendments to section 334 of the URAA necessitate corresponding changes to the Customs Regulations, this document amends § 102.21 on an interim basis to implement the rules of origin for the textile products specified in section 405(a) of the Act.

COMMENTS

Before adopting this interim regulation as a final rule, consideration will be given to any written comments timely submitted to Customs, including comments on the clarity of this interim rule and how it may be made easier to understand. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), §1.4 of the Treasury Department Regulations (31 CFR 1.4), and §103.11(b) of the Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., 3rd Floor, Washington, D.C.

INAPPLICABILITY OF PRIOR PUBLIC NOTICE AND COMMENT PROCEDURES

Because these regulations serve to align the Customs Regulations to the statutory amendments to section 334 of the URAA, as set forth in section 405 within Title IV of the Act, which went into effect May 18, 2000, Customs has determined, pursuant to the provisions of 5 U.S.C. 553(b)(B), that prior public notice and comment procedures on this regulation are unnecessary and contrary to the public interest. The regulatory amendments inform the public of changes to the processing operations deemed necessary to confer country of origin status to certain textile fabrics or made-up articles by way of amendment to the tariff shift rules applicable to select textile goods. For these reasons, pursuant to the provisions of 5 U.S.C. 553(d)(3), Customs finds that there is good cause for dispensing with a delayed effective date.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

REGULATORY FLEXIBILITY ACT

Because no notice of proposed rulemaking is required for these interim regulations, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

DRAFTING INFORMATION

The principal author of this document was Suzanne Kingsbury, Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 102

Customs duties and inspection, Imports, Rules of Origin, Trade agreements.

AMENDMENT TO THE REGULATIONS

For the reasons stated above, part 102 of the Customs Regulations (19 CFR part 102) is amended as set forth below.

PART 102—RULES OF ORIGIN

1. The authority citation for part 102 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 22, Harmonized Tariff Schedule of the United States), 1624, 3314, 3592.

2. In § 102.21: the introductory text to paragraph (e) is redesignated as paragraph (e)(1) and revised; in newly designated paragraph (e)(1) the table is amended by revising the entries in the "Tariff shift and/or other requirements" column adjacent to the "HTSUS" column listing for 5007, 5208–5212, 5309–5311, 5407–5408, 5512–5516, 5602–5603, 5608, 5801–5803, 5804.10, 5804.21–5804.30, 5806, 5808.90, 5901–5903, 5905, 5906–5907, 5911.10–5911.20, 5911.31–5911.32, 5911.40, 5911.90, 6001–6002, 6101–6117, 6213–6214, 6301–6306 and 9404.90; and a new paragraph (e)(2) is added, to read as follows:

§ 102.21 Textile and apparel products.

* * * * * * *

(e) *Specific rules by tariff classification*—(1) The following rules will apply for purposes of determining the country of origin of a textile or apparel product under paragraph (c)(2) of this section:

HTSUS	*Tariff shift and/or other requirements*
* * *	* * * * *
5007	(1) A change from greige fabric of heading 5007 to finished fabric of heading 5007 by both dyeing and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing; or, (2) If the country of origin cannot be determined under (1) above, a change to heading 5007 from any other heading, provided that the change is the result of a fabric-making process.

HTSUS	*Tariff shift and/or other requirements*
* * *	* * * *
5208–5212	(1) A change from greige fabric of heading 5208 through 5212 to finished fabric of heading 5208 through 5212 by both dyeing and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing; or (2) If the country of origin cannot be determined under (1) above, a change to heading 5208 through 5212 from any heading outside that group, provided that the change is the result of a fabric-making process.
* * *	* * * *
5309–5311	(1) A change from greige fabric of heading 5309 through 5311 to finished fabric of heading 5309 through 5311 by both dyeing and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing; or (2) If the country of origin cannot be determined under (1) above, a change to heading 5309 through 5311 from any heading outside that group, provided that the change is the result of a fabric-making process.
* * *	* * * *
5407–5408	(1) A change from greige fabric of heading 5407 through 5408 to finished fabric of heading 5407 through 5408 by both dyeing and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing; or (2) If the country of origin cannot be determined under (1) above, a change to heading 5407 through 5408 from any heading outside that group, provided that the change is the result of a fabric-making process.
* * *	* * * *
5512–5516	(1) A change from greige fabric of heading 5512 through 5516 to finished fabric of heading 5512 through 5516 by both dyeing and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing; or (2) If the country of origin cannot be determined under (1) above, a change to heading 5512 through 5516 from any heading outside that group, provided that the change is the result of a fabric-making process.
* * *	* * * *

HTSUS	*Tariff shift and/or other requirements*
5602–5603	(1) Except for fabric of wool or of fine animal hair, a change from greige fabric of heading 5602 through 5603 to finished fabric of heading 5602 through 5603 by both dyeing and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing; or (2) If the country of origin cannot be determined under (1) above, a change to heading 5602 through 5603 from any heading outside that group, provided that the change is the result of a fabric-making process.
* * *	* * * *
5608	(1)(a) Except for netting of wool or of fine animal hair, a change from greige netting of heading 5608 to finished netting of heading 5608 by both dyeing and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing; or (1)(b) If the country of origin cannot be determined under (1)(a) above, a change to netting of heading 5608 from any other heading, except from heading 5804, and provided that the change is the result of a fabric-making process. (2) A change to fishing nets or other made up nets of heading 5608: (a) If the good does not contain nontextile attachments, from any other heading, except from heading 5804 and 6002, and provided that the change is the result of a fabric-making process; or (b) If the good contains nontextile attachments, from any heading, including a change from another good of heading 5608, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession.
* * *	* * * *
5801–5803	(1) Except for fabric of wool or of fine animal hair, a change from greige fabric of heading 5801 through 5803 to finished fabric of heading 5801 through 5803 by both dyeing and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing; or (2) If the country of origin cannot be determined under (1) above, a change to heading 5801 through 5803 from any other heading, including a heading within that group, except from heading 5007, 5111 through 5113, 5208 through 5212, 5309 through 5311, 5407 through 5408, 5512 through 5516, and 6002, and provided that the change is the result of a fabric- making process.

HTSUS	*Tariff shift and/or other requirements*
5804.10	(1) Except for fabric of wool or of fine animal hair, a change from greige fabric of subheading 5804.10 to finished fabric of subheading 5804.10 by both dyeing and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing; or (2) If the country of origin cannot be determined under (1) above, a change to subheading 5804.10 from any other heading, except from heading 5608, and provided that the change is the result of a fabric-making process.
5804.21–5804.30	(1) Except for lace of wool or of fine animal hair, a change from greige lace of subheading 5804.21 through 5804.30 to finished lace of subheading 5804.21 through 5804.30 by both dyeing and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing; or (2) If the country of origin cannot be determined under (1) above, a change to subheading 5804.21 through 5804.30 from any other heading, provided that the change is the result of a fabric-making process.
* * *	* * * * *
5806	(1) Except for fabric of wool or of fine animal hair, a change from greige fabric of heading 5806 to finished fabric of heading 5806 by both dyeing and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing; or (2) If the country of origin cannot be determined under (1) above, a change to heading 5806 from any other heading, except from heading 5007, 5111 through 5113, 5208 through 5212, 5309 through 5311, 5407 through 5408, 5512 through 5516, and 5801 through 5803, and provided that the change is the result of a fabric-making process.
* * *	* * * * *

HTSUS	*Tariff shift and/or other requirements*
5808.90	(1) For ornamental fabric trimmings: (a) A change from a greige good of subheading 5808.90 to a finished good of subheading 5808.90 by both dyeing and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing; or, (b) If the country of origin cannot be determined under (a) above, a change to subheading 5808.90 from any other chapter, except from heading 5007, 5111 through 5113, 5208 through 5212, 5309 through 5311, 5407 through 5408, and 5512 through 5516, and provided that the change is the result of a fabric-making process. (2) For nonfabric ornamental trimmings: (a) If the trimming is of continuous filaments, including strips, a change to subheading 5808.90 from any other heading, except from heading 5001 through 5007, 5401 through 5408, 5501 through 5502, and 5604 through 5607, and provided that the change is the result of an extrusion process; or (b) If the trimming is of staple fibers, a change to subheading 5808.90 from any other heading, except from heading 5106 through 5113, 5204 through 5212, 5306 through 5311, 5401 through 5408, 5508 through 5516, and 5604 through 5607, and provided that the change is the result of a spinning process. (3) For tassels, pompons and similar articles: (a) If the good has been wholly assembled in a single country, territory, or insular possession, a change to subheading 5808.90 from any other heading; (b) If the good has not been wholly assembled in a single country, territory, or insular possession and the good is of staple fibers, a change to subheading 5808.90 from any other heading, except from heading 5004 through 5006, 5106 through 5110, 5204 through 5207, 5306 through 5308, and 5508 through 5511, and 5604 through 5607, and provided that the change is the result of a spinning process; or (c) If the good has not been wholly assembled in a single country, territory, or insular possession and the good is of filaments, including strips, a change to subheading 5808.90 from any other heading, except from heading 5001 through 5007, 5401 through 5406, and 5501 through 5502, and provided that the change is the result of an extrusion process.

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HTSUS	*Tariff shift and/or other requirements*
5901–5903	(1) Except for fabric of wool or of fine animal hair, a change from greige fabric of heading 5901 through 5903 to finished fabric of heading 5901 through 5903 by both dyeing and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing; or, (2) If the country of origin cannot be determined under (1) above, a change to heading 5901 through 5903 from any other heading, including a heading within that group, except from heading 5007, 5111 through 5113, 5208 through 5212, 5309 through 5311, 5407 through 5408, 5512 through 5516, 5803, 5806, 5808, and 6002, and provided that the change is the result of a fabric-making process.
* * *	* * * * *
5905	(1) Except for wall coverings consisting of textile fabric of wool or of fine animal hair treated on the back or affixed by any means to a backing of any material, a change from wall coverings of greige fabric of heading 5905 to wall coverings of finished fabric of heading 5905 by both dyeing and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decat ing, permanent stiffening, weighting, permanent embossing, or moireing; or, (2) If the country of origin cannot be determined under (1) above, a change to heading 5905 from any other heading, except from heading 5007, 5111 through 5113, 5208 through 5212, 5309 through 5311, 5407 through 5408, 5512 through 5516, 5603, 5803, 5806, 5808, and 6002, and provided that the change is the result of a fabric-making process.
5906–5907	(1) Except for fabric of wool or of fine animal hair, a change from greige fabric of heading 5906 through 5907 to finished fabric of heading 5906 through 5907 by both dyeing and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing; or, (2) If the country of origin cannot be determined under (1) above, a change to heading 5906 through 5907 from any other chapter, except from heading 5007, 5111 through 5113, 5208 through 5212, 5309 through 5311, 5407 through 5408, 5512 through 5516, 5803, 5806, 5808, and 6002, and provided that the change is the result of a fabric-making process.
* * *	* * * * *

HTSUS	*Tariff shift and/or other requirements*
5911.10–5911.20	(1) Except for fabric of wool or of fine animal hair, a change from greige fabric of subheading 5911.10 through 5911.20 to finished fabric of subheading 5911.10 through 5911.20 by both dyeing and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing; or, (2) If the country of origin cannot be determined under (1) above, a change to subheading 5911.10 through 5911.20 from any other heading, except from heading 5007, 5111 through 5113, 5208 through 5212, 5309 through 5311, 5407 through 5408, 5512 through 5516, 5602 through 5603, 5801 through 5804, 5806, and 6001 through 6002, and provided that the change is the result of a fabric-making process.
5911.31–5911.32	(1)(a) Except for fabric of wool or of fine animal hair, a change from greige fabric of subheading 5911.31 through 5911.32 to finished fabric of subheading 5911.31 through 5911.32 by both dyeing and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing; or, (1)(b) If the country of origin cannot be determined under (1)(a) above, for goods not combined with nontextile components, a change to subheading 5911.31 through 5911.32 from any other heading, except from heading 5007, 5111 through 5113, 5208 through 5212, 5309 through 5311, 5407 through 5408, 5512 through 5516, 5602 through 5603, 5801 through 5804, 5806, and 6001 through 6002, and provided that the change is the result of a fabric- making process. (2) For goods combined with nontextile components, a change to subheading 5911.31 through 5911.32 from any other heading, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession.
5911.40	(1) Except for fabric of wool or of fine animal hair, a change from greige fabric of subheading 5911.40 to finished fabric of subheading 5911.40 by both dyeing and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing; or, (2) If the country of origin cannot be determined under (1) above, a change to subheading 5911.40 from any other heading, except from heading 5007, 5111 through 5113, 5208 through 5212, 5309 through 5311, 5407 through 5408, 5512 through 5516, 5602 through 5603, 5801 through 5804, 5806, and 6001 through 6002, and provided that the change is the result of a fabric-making process.

HTSUS	*Tariff shift and/or other requirements*
5911.90	(1) For goods of yarn, rope, cord, or braid: (a) If the good is of continuous filaments, including strips, a change of those filaments, including strips, to subheading 5911.90 from any other heading, except from heading 5001 through 5006, 5401 through 5406, and 5501 through 5502, and provided that the change is the result of an extrusion process; or (b) If the good is of staple fibers, a change of those fibers to subheading 5911.90 from any other heading, except from heading 5106 through 5110, 5204 through 5207, 5306 through 5308, and 5508 through 5511, and provided that the change is the result of a spinning process. (2)(a) If the good is a fabric, except for fabric of wool or of fine animal hair, a change from greige fabric of subheading 5911.90 to finished fabric of subheading 5911.90 by both dyeing and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing; or, (2)(b) If the country of origin cannot be determined under (2)(a) above, if the good is a fabric, a change to subheading 5911.90 from any other heading, except from heading 5007, 5111 through 5113, 5208 through 5212, 5309 through 5311, 5407 through 5408, 5512 through 5516, 5602 through 5603, 5801 through 5804, 5806, 5809, and 6001 through 6002, and provided that the change is the result of a fabric-making process. (3) If the good is a made up article other than a good of yarn, rope, cord, or braid, a change to subheading 5911.90 from any heading, including a change from another good of heading 5911, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession.
6001–6002	(1) Except for fabric of wool or of fine animal hair, a change from greige fabric of heading 6001 through 6002 to finished fabric of heading 6001 through 6002 by both dyeing and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing; or, (2) If the country of origin cannot be determined under (1) above, a change to heading 6001 through 6002 from any heading outside that group, provided that the change is the result of a fabric-making process.

HTSUS	*Tariff shift and/or other requirements*
6101–6117	(1) If the good is not knit to shape and consists of two or more component parts, except for goods of subheading 6117.10 provided for in paragraph (e)(2) of this section, a change to an assembled good of heading 6101 through 6117 from unassembled components, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession. (2) If the good is not knit to shape and does not consist of two or more component parts, except for goods of subheading 6117.10 provided for in paragraph (e)(2) of this section, a change to heading 6101 through 6117 from any heading outside that group, except from heading 5007, 5111 through 5113, 5208 through 5212, 5309 through 5311, 5407 through 5408, 5512 through 5516, 5806, 5809 through 5811, 5903, 5906 through 5907, and 6001 through 6002, and subheading 6307.90, and provided that the change is the result of a fabric-making process. (3) If the good is knit to shape, except for goods of subheading 6117.10 provided for in paragraph (e)(2) of this section, a change to 6101 through 6117 from any heading outside that group, provided that the knit to shape components are knit in a single country, territory, or insular possession.
* * *	* * * * *
6213–6214	Except for goods of heading 6213 through 6214 provided for in paragraph (e)(2) of this section, the country of origin of a good classifiable under heading 6213 through 6214 is the country, territory, or insular possession in which the fabric comprising the good was formed by a fabric-making process.
* * *	* * * * *
6031–6306	Except for goods of heading 6302 through 6304 provided for in paragraph (e)(2) of this section, the country of origin of a good classifiable under heading 6301 through 6306 is the country, territory, or insular possession in which the fabric comprising the good was formed by a fabric-making process.
* * *	* * * * *
9404.90	Except for goods of subheading 9404.90 provided for in paragraph (e)(2) of this section, the country of origin of a good classifiable under subhead ing 9404.90 is the country, territory, or insular possession in which the fabric comprising the good was formed by a fabric-making process.
* * *	* * * * *

(2) For goods of HTSUS headings 6213 and 6214 and HTSUS subheadings 6117.10, 6302.22, 6302.29, 6302.52, 6302.53, 6302.59, 6302.92, 6302.93, 6302.99, 6303.92, 6303.99, 6304.19, 6304.93, 6304.99, 9404.90.85 and 9404.90.95, except for goods classified under those headings or subheadings as of cotton or of wool or consisting of fiber blends containing 16 percent or more by weight of cotton:

(i) The country of origin of the good is the country, territory, or insular possession in which the fabric comprising the good was both dyed and printed when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing;

(ii) If the country of origin cannot be determined under (i) above, except for goods of HTSUS subheading 6117.10 that are knit to shape or consist of two or more component parts, the country of origin is the country, territory, or insular possession in which the fabric comprising the good was formed by a fabric-making process; or

(iii) For goods of HTSUS subheading 6117.10 that are knit to shape or consist of two or more component parts:

(A) If the good is knit to shape, the country of origin of the good is the country, territory, or insular possession in which a change to HTSUS subheading 6117.10 from yarn occurs, provided that the knit to shape components are knit in a single country, territory, or insular possession; or

(B) If the good is not knit to shape and consists of two or more component parts, the country of origin of the good is the country, territory, or insular possession in which a change to an assembled good of HTSUS subheading 6117.10 from unassembled components occurs, provided that the change is the result of the good being wholly assembled in a single country, territory, or insular possession.

CHARLES W. WINWOOD,
Acting Commissioner of Customs.

Approved: April 13, 2001.

TIMOTHY E. SKUD,
Acting Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, May 1, 2001 (66 FR 21660)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, April 25, 2001.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

REVOCATION & MODIFICATION OF CUSTOMS RULING LETTERS & REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF NAPPED BED LINEN

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation and modification of tariff classification ruling letters and revocation of treatment relating to the classification of a napped bed linen.

SUMMARY: Pursuant to Section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke four ruling letters and modify another pertaining to the tariff classification of napped bed linen under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Similarly, Customs is also revoking any treatment previously accorded by Customs to substantially identical merchandise that is contrary to the position set forth in this notice. Notice of the proposed action was published on March 14, 2001, in Volume 35, Number 11 of the CUSTOMS BULLETIN. The only comment received was in favor of the action.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after July 9, 2001.

FOR FURTHER INFORMATION CONTACT: Mary Beth Goodman, Textile Branch, (202) 927–1368.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. § 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, notice proposing to revoke NY Ruling Letter ("NY") D87088, dated March 2, 1999; NY D87089, dated March 2, 1999; NY E81441, dated May 19, 1999; and NY F89392, dated August 2, 2000, and in addition to modify NY F83310, dated March 15, 2000, pertaining to the classification of various bed linen with a slight level of napping napped bed linen was published on March 14, 2001, in Vol. 35, No. 11 of the CUSTOMS BULLETIN. The only comment received was in favor of the action.

As stated in the proposed notice, this revocation and modification will cover any rulings on the subject merchandise which may exist but which have not been specifically identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially iden-

tical transactions should have advised Customs during this notice and comment period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of the final decision of this notice.

The subject bed linen was originally classified in heading 6302 of the Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"), as not napped bed linen. However, upon further review of this line of merchandise it was determined that those bed linens which have slight brushing or napping should be classified accordingly in the Harmonized Tariff Schedule.

Statistical Note 1(k), Chapter 52 to the HTSUSA which defines napping does not require that a specified amount of fibers must be raised in order to qualify as a napped good. Rather the note requires that "*some* of the fibers" are raised. The items under review are described as various bed linens which have undergone a brushing process to produce a slight level of raised fibers on the surface of the linen. The subject merchandise was originally classified as "not napped" due to the low level of brushing on the fabric, however, this classification was in error.

It is now Customs position that the tariff does not require that a set amount of fibers must be raised in order to qualify as a napped product for classification purposes and therefore the U.S. Customs Service will not subjectively determine levels of napping which must be fulfilled for products to be classified as napped. While the napping on the subject merchandise is slight, the level of napping is still detectable and has been accomplished through the brushing process which is necessary for the formation of all napping. Therefore, it is the determination of the Customs Service, that the subject cotton, printed, napped bed linen is classifiable in subheading 6302.21.70, HTSUSA, and in subheading 6302.31.70, HTSUSA, for cotton, napped bed linen.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is revoking NY F89392, NY D87088, NY D87089, NY E81441 and modifying NY F83310 pursuant to the analysis set forth in Headquarter Rulings ("HQ") 964820; HQ 964821; HQ 964822; HQ 964823; and HQ 964819. (See Attachments A through E to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical merchandise.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

Dated: April 24, 2001.

GAIL A. HAMILL,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 24, 2001.

CLA–2 RR:CR:TE 964820 mbg
Category: Classification
Tariff No. 6302.21.7010 and 6302.21.7020

MR. SAID ORDAZMORENO
DANZAS CORPORATION
80 Broad Street, 9th Floor
New York, NY 10004

Re: Napped Bed Linen from Portugal; Revocation of NY F89392.

DEAR MR. ORDAZMORENO:

On August 2, 2000, Customs issued New York Ruling Letter ("NY") NY F89392 to Danzas Corporation regarding the tariff classification of bed linen which was originally classified as "not napped" under heading 6302 of the Harmonized Tariff Schedule Annotated ("HTSUSA"). Upon review, Customs has determined that the bed linen was erroneously classified. The correct classification for the product should be under heading 6302, HTSUSA, as napped bed linen. NY F89392 is hereby revoked for the reasons set forth below.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice was published on March 14, 2001, in Vol. 35, No. 11 of the CUSTOMS BULLETIN, proposing to revoke NY F89392 and to revoke the treatment pertaining to the classification of napped bed linen. The only comment received was in favor of the action.

Facts:

According to NY F89392, you submitted a sample of a pillowcase. The submitted sample is made from 50 percent polyester and 50 percent cotton woven fabric. However, you indicate that the actual product will be made from a chief weight cotton fabric. The sample is printed with a leaf pattern. It is sewn along two edges and has a slit opening at one end. You note that you will also import sheets but samples were not provided. We assume that like the pillowcase, the sheets do not contain any embroidery, lace, braid, edging, trimming, piping or applique work.

For tariff classification purposes, the difference between napped and not napped bed linen is less than 3 percent *ad valorem*, however, not napped printed bed linen from the European Union is currently subject to a 100 percent *ad valorem* rate of duty pursuant to trade sanctions imposed by the United States Trade Representative. [1]

Upon review, the classification applied by Customs in NY F89392 was incorrect. In NY F89392, the flat and fitted sheets were classified under subheading 6302.21.9020, HTSUSA, as "Other bed linen, printed: of cotton: not napped: sheets" and the pillowcases were classified under subheading 6302.21.9010, HTSUSA, as "Other bed linen, printed: of cotton: not napped: pillowcases."

Issue:

What is the proper classification for the described bed linen?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation ("GRI"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

The Explanatory Notes ("EN") to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the

[1] Please be advised that USTR issued a press release on April 11, 2001, which indicated the withdrawal of the 100 percent duties as of July 1, 2001. For further information regarding duty rates for goods imported from the European Union, please see the USTR website at "www.ustr.gov".

scope of the headings and GRI. The EN state in regard to heading 6302, HTSUSA, that "bed linen" includes "sheets, pillowcases, bolster cases, eiderdown cases and mattress covers." As bed linen is *eo nomine* provided for within heading 6302, HTSUSA, classification within this heading is proper.

Under the terms of the HTSUSA, the classification of bed linen depends upon the fiber content; whether printed or not; whether napped or not; whether any component contains embroidery, trimming, lace, etc., and whether the sheet set constitutes a "retail" set or not. The determinative issue in this case is whether the subject sheets are considered napped or not napped for tariff classification purposes and specifically what level or amount of napping is required.

Statistical Note 1(k) to Chapter 52 of the HTSUSA which provides for cotton states:

> The term *"napped"* means fabrics with a fuzzy, fibrous surface produced by scratching or pricking the surface so that some of the fibers are raised from the body of the yarn. Napped fabrics are not to be confused with pile fabrics. Outing and canton flannel, moleskin, etc. are typical fabrics with a nap.

Determination of the tariff classification of the subject merchandise requires an understanding of terminology which is germane to the issue and utilized by the textile industry. We note the following definitions:

Nap	A downy surface given to a cloth when part of the fiber is raised from the basic structure. DICTIONARY OF FIBER & TEXTILE TECHNOLOGY 100 (1990).
Napping	A finishing process that raises the surface fibers of a fabric by means of passage over rapidly revolving cylinders covered with metal points or teasel burrs. DICTIONARY OF FIBER & TEXTILE TECHNOLOGY 100 (1990).
Napped Fabrics	Napped fabrics are processed so that they have either a slight or a dramatic nap on the face or both sides of the fabric. The napping process is accomplished by weaving loosely twisted yarns into the textile, which are then sheared and brushed to create the soft napped surface. Napped fabrics differ from PILE fabrics, in that they do not have extra threads incorporated in the textile. Napping is considered a FINISHING process and is used on many fibers, including manufactured fibers, silk and wool, as well as specialty fibers such as camel hair and mohair. Occasionally the napped effect does not continuously cover the fabric but is executed in stripes or figures. ENCYCLOPEDIA OF TEXTILES, Judith Jerde, 157 (1992).
Napped-Finished Goods	These may be of a single or double finish, *slight or heavy.* Single finish occurs when one side of the goods is napped; double finish fabric has both sides of the material napped. *A slight finish occurs when the napped cloth is not as high in protruding fibers nor as thick when compared with heavy nap.* The finish is given to fabrics known for their napped characteristics and for those that can withstand the rigors of the treatment. Certain woolen and cotton cloths receive this type of treatment—baby clothes, blankets, domett, flannel, lining, molleton, silence cloth, etc. The finish is applied by rollers covered with 1 inch card clothing similar to that used on the fancy roller of the woolen card, or by a roller clothed with teasels. Some fabrics are given from three to four up to ten or twelve roller treatments to obtain the desired napped effect for the surface finish. The napping may be done in the gray goods states as well as in the regular finishing operations. THE MODERN TEXTILE AND APPAREL DICTIONARY, George E. Linton, 386 (1973).

(emphasis added.)

Neither the Court of International Trade nor its predecessor, the Customs Court, have considered the issue of napping exclusive of making a distinction from pile. However, in *Til-*

ton Textile Corp. v. United States, 424 F.Supp 1053, 77 Cust. Ct. 27, C.D. 4670 (1976) *aff'd*, 565 F.2d 140 (1977), the court stated:

> [W]hat is termed a "nap" or "napped fabrics" is produced by the raising of *some of the fibers* of the threads which compose the basic fabric, whereas the "pile" on "pile fabrics" must be the raising at intervals, in the form of loops, the entire thickness of extra threads introduced into, but not essential to the basic fabric, which thus form an "uncut pile."

Tilton at 44. (emphasis added.) The Customs Court acknowledged that only *some of the fibers* must be raised on the fabric. Furthermore, Statistical Note 1(k), Chapter 52 to the HTSUS which defines "napping" does not require that a specified amount of fibers must be raised in order to qualify as a napped good. Rather the Note requires that "*some* of the fibers" are raised.

The issue of what levels of napping are required in order to be considered "napped" for tariff classification purposes under the HTSUSA was based on the issuance of a ruling under the previous tariff. HQ 080945, dated July 20, 1988, dealt with the issue of whether cotton twill fabric was napped for purposes of the Tariff Schedule of the United States, the predecessor to the current Harmonized Tariff Schedule of the United States. HQ 080945 stated:

> Both technical literature and the Statistical Headnotes to the Tariff Schedules of the United States Annotated ("TSUSA") indicate that for a fabric to be known as *napped* it *must have a substantial portion* of at least one surface covered with raised fibers.

(emphasis added). However, review of Headnote 1(k), Subpart A, Part 3, Schedule 3 TSUSA, which is the relevant TSUSA Note on napped fabrics, reveals that HQ 080945 was in error. The TSUSA Note states:

> *Napped*: Fabrics with a fuzzy, fibrous surface produced by scratching or pricking the surface so that some of the fibers are raised from the body of the yarn. Napped fabrics are not to be confused with pile fabrics. Outing and canton fabrics, moleskin, etc., are typical fabrics with a nap.

See Headnote 1(k), Subpart A, Part 3, Schedule 3 TSUSA. The applicable Note under the TSUSA only requires that *some* of the fibers are raised in the fabric to be napped. This is consistent with the HTSUSA as well as the *Tilton* decision.

The tariff does not require that a set amount of fibers must be raised in order to qualify as a napped product for classification purposes and therefore the U.S. Customs Service will not subjectively determine levels of napping which must be fulfilled for products to be classified as napped. While the napping on the subject merchandise is slight, the level of napping is still visible to the eye and has been accomplished through the brushing process which is necessary for the formation of all napping. Therefore, the subject merchandise is considered napped for tariff classification purposes.

Holding:

NY F89392 is hereby revoked.

The subject pillowcases are properly classified in subheading 6302.21.7010, HTSUSA, as "Bed Linen, table linen, toilet linen and kitchen linen: Other bed linen, printed: Of cotton: Other: Napped: Pillowcases, other than bolster cases." The general column one rate of duty is 4 percent *ad valorem*. The textile restraint number is 360.

The subject flat and fitted sheets are properly classified in subheading 6302.21.7020, HTSUSA, as "Bed Linen, table linen, toilet linen and kitchen linen: Other bed linen, printed: Of cotton: Other: Napped: Sheets." The general column one rate of duty is 4 percent *ad valorem*. The textile restraint number is 361.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, *The Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

Effect on Other Rulings:

NY F89392 is revoked. In accordance with 19 U.S.C. §1625 (c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

GAIL A. HAMILL,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 24, 2001.

CLA–2 RR:CR:TE 964821 mbg
Category: Classification
Tariff No. 6302.21.7010 and 6302.21.7020

MS. KATHY BRENNAN
EDDIE BAUER INC.
P.O. Box 97000
Redmond, WA 98073–9700

Re: Napped Bed Linen from Portugal; Revocation of NY D87088.

DEAR MS. BRENNAN:

On March 2, 1999, Customs issued New York Ruling Letter ("NY") NY D87088 to you regarding the tariff classification of bed linen which was originally classified as "not napped" under heading 6302 of the Harmonized Tariff Schedule Annotated ("HTSUSA"). Upon review, Customs has determined that the bed linen was erroneously classified. The correct classification for the product should be under heading 6302, HTSUSA, as napped bed linen. NY D87088 is hereby revoked for the reasons set forth below.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice was published on March 14, 2001, in Vol. 35, No. 11 of the CUSTOMS BULLETIN, proposing to revoke NY D87088 and to revoke the treatment pertaining to the classification of napped bed linen. The only comment received was in favor of the action.

Facts:

According to NY D87088, you submitted a sample of a sheet set, referred to as the "Antique Mini Floral Queen Sized Sheet Set" item number 077–6906. The set consists of a flat sheet, fitted sheet and two pillowcases. They are made from a 100 percent cotton woven fabric that has been printed with a floral design. The flat sheet is hemmed on all four sides and the fitted sheet is fully elasticized. The sheet set will also be imported in twin size (item # 077–6904), full size (item # 077–6905) and king size (item # 077–6907). In addition to those contained in the sets, individual pillowcases will be imported separately in standard size (item # 077–6908) and king size (item # 077–6909).

For tariff classification purposes, the difference between napped and not napped bed linen is less than 3 percent *ad valorem*, however, not napped printed bed linen from the European Union is currently subject to a 100 percent *ad valorem* rate of duty pursuant to trade sanctions imposed by the United States Trade Representative.

Upon review, the classification applied by Customs in NY D87088 was incorrect. In NY D87088, the flat and fitted sheets were classified under subheading 6302.21.9020, HTSUSA, as "Other bed linen, printed: of cotton: not napped: sheets," and the pillowcases were classified under subheading 6302.21.9010, HTSUSA, as "Other bed linen, printed: of cotton: not napped: pillowcases."

Issue:

What is the proper classification for the described bed linen?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation ("GRI"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

The Explanatory Notes ("EN") to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. The EN state in regard to heading 6302, HTSUSA, that "bed linen" includes "sheets, pillowcases, bolster cases, eiderdown cases and mattress covers." As bed linen is *eo nomine* provided for within heading 6302, HTSUSA, classification within this heading is proper.

Under the terms of the HTSUSA, the classification of bed linen depends upon the fiber content; whether printed or not; whether napped or not; whether any component contains embroidery, trimming, lace, etc., and whether the sheet set constitutes a "retail" set or not. The determinative issue in this case is whether the subject sheets are considered napped or not napped for tariff classification purposes and specifically what level or amount of napping is required.

Statistical Note 1(k) to Chapter 52 of the HTSUSA which provides for cotton states:

> The term "*napped*" means fabrics with a fuzzy, fibrous surface produced by scratching or pricking the surface so that some of the fibers are raised from the body of the yarn. Napped fabrics are not to be confused with pile fabrics. Outing and canton flannel, moleskin, etc. are typical fabrics with a nap.

Determination of the tariff classification of the subject merchandise requires an understanding of terminology which is germane to the issue and utilized by the textile industry. We note the following definitions:

Nap	A downy surface given to a cloth when part of the fiber is raised from the basic structure. DICTIONARY OF FIBER & TEXTILE TECHNOLOGY 100 (1990).
Napping	A finishing process that raises the surface fibers of a fabric by means of passage over rapidly revolving cylinders covered with metal points or teasel burrs. DICTIONARY OF FIBER & TEXTILE TECHNOLOGY 100 (1990).
Napped Fabrics	Napped fabrics are processed so that they have either a slight or a dramatic nap on the face or both sides of the fabric. The napping process is accomplished by weaving loosely twisted yarns into the textile, which are then sheared and brushed to create the soft napped surface. Napped fabrics differ from PILE fabrics, in that they do not have extra threads incorporated in the textile. Napping is considered a FINISHING process and is used on many fibers, including manufactured fibers, silk and wool, as well as specialty fibers such as camel hair and mohair. Occasionally the napped effect does not continuously cover the fabric but is executed in stripes or figures. ENCYCLOPEDIA OF TEXTILES, Judith Jerde, 157 (1992).
Napped-Finished Goods	These may be of a single or double finish, *slight or heavy*. Single finish occurs when one side of the goods is napped; double finish fabric has both sides of the material napped. *A slight finish occurs when the napped cloth is not as high in protruding fibers nor as thick when compared with heavy nap.* The finish is given to fabrics known for their napped characteristics and for those that can withstand the rigors of the treatment. Certain woolen and cotton cloths receive this type of treatment-baby clothes, blankets, domett, flannel, lining, molleton, silence cloth, etc.

> The finish is applied by rollers covered with 1 inch card clothing similar to that used on the fancy roller of the woolen card, or by a roller clothed with teasels.
>
> Some fabrics are given from three to four up to ten or twelve roller treatments to obtain the desired napped effect for the surface finish. The napping may be done in the gray goods states as well as in the regular finishing operations. THE MODERN TEXTILE AND APPAREL DICTIONARY, George E. Linton, 386 (1973).

(emphasis added.)

Neither the Court of International Trade nor its predecessor, the Customs Court, have considered the issue of napping exclusive of making a distinction from pile. However, in *Tilton Textile Corp. v. United States*, 424 F.Supp 1053, 77 Cust. Ct. 27, C.D. 4670 (1976) *aff'd*, 565 F.2d 140 (1977), the court stated:

> [W]hat is termed a "nap" or "napped fabrics" is produced by the raising of *some of the fibers* of the threads which compose the basic fabric, whereas the "pile" on "pile fabrics" must be the raising at intervals, in the form of loops, the entire thickness of extra threads introduced into, but not essential to the basic fabric, which thus form an "uncut pile."

Tilton at 44. (emphasis added.) The Customs Court acknowledged that only *some of the fibers* must be raised on the fabric. Furthermore, Statistical Note 1(k), Chapter 52 to the HTSUS which defines "napping" does not require that a specified amount of fibers must be raised in order to qualify as a napped good. Rather the Note requires that "*some* of the fibers" are raised.

The issue of what levels of napping are required in order to be considered "napped" for tariff classification purposes under the HTSUSA was based on the issuance of a ruling under the previous tariff. HQ 080945, dated July 20, 1988, dealt with the issue of whether cotton twill fabric was napped for purposes of the Tariff Schedule of the United States, the predecessor to the current Harmonized Tariff Schedule of the United States. HQ 080945 stated:

> Both technical literature and the Statistical Headnotes to the Tariff Schedules of the United States Annotated ("TSUSA") indicate that for a fabric to be known as *napped* it *must have a substantial portion* of at least one surface covered with raised fibers.

(emphasis added). However, review of Headnote 1(k), Subpart A, Part 3, Schedule 3 TSUSA, which is the relevant TSUSA Note on napped fabrics, reveals that HQ 080945 was in error. The TSUSA Note states:

> *Napped:* Fabrics with a fuzzy, fibrous surface produced by scratching or pricking the surface so that some of the fibers are raised from the body of the yarn. Napped fabrics are not to be confused with pile fabrics. Outing and canton fabrics, moleskin, etc., are typical fabrics with a nap.

See Headnote 1(k), Subpart A, Part 3, Schedule 3 TSUSA. The applicable Note under the TSUSA only requires that *some* of the fibers are raised in the fabric to be napped. This is consistent with the HTSUSA as well as the *Tilton* decision.

The tariff does not require that a set amount of fibers must be raised in order to qualify as a napped product for classification purposes and therefore the U.S. Customs Service will not subjectively determine levels of napping which must be fulfilled for products to be classified as napped. While the napping on the subject merchandise is slight, the level of napping is still visible to the eye and has been accomplished through the brushing process which is necessary for the formation of all napping. Therefore, the subject merchandise is considered napped for tariff classification purposes.

Furthermore, classification of the subject merchandise as a set is inappropriate. GRI 3(b) provides for the classification of goods put up in sets for retail sale. The rule states, in pertinent part, as follows:

> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

Explanatory Note (X) (page 5) to GRI 3(b) states that the term "goods put up in sets for retail sale" means goods which:

(a) consist of at least two different articles which are, prima facie, classifiable in different headings;
(b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
(c) are put up in a manner suitable for sale directly to users without repacking.

In the instant case, the merchandise consists of products that, if imported separately, are not classifiable in the different headings of the HTSUSA and therefore, consideration of the merchandise as a set is inappropriate.

Holding:

NY D87088 is hereby revoked.

The subject pillowcases are properly classified in subheading 6302.21.7010, HTSUSA, as "Bed Linen, table linen, toilet linen and kitchen linen: Other bed linen, printed: Of cotton: Other: Napped: Pillowcases, other than bolster cases." The general column one rate of duty is 4 percent *ad valorem*. The textile restraint number is 360.

The subject flat and fitted sheets are properly classified in subheading 6302.21.7020, HTSUSA, as "Bed Linen, table linen, toilet linen and kitchen linen: Other bed linen, printed: Of cotton: Other: Napped: Sheets." The general column one rate of duty is 4 percent *ad valorem*. The textile restraint number is 361.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, *The Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

Effect on Other Rulings:

NY D87088 is revoked. In accordance with 19 U.S.C. §1625 (c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

GAIL A. HAMILL,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 24, 2001.

CLA–2 RR:CR:TE 964822 mbg
Category: Classification
Tariff No. 6302.21.7010,
6302.21.7020 and 6302.21.7050

MS. KATHY BRENNAN
EDDIE BAUER INC.
P.O. Box 97000
Redmond, WA 98073–9700

Re: Napped Bed Linen from Portugal; Revocation of NY D87089.

DEAR MS. BRENNAN:

On March 2, 1999, Customs issued New York Ruling Letter ("NY") NY D87089 to your company regarding the tariff classification of bed linen which was originally classified as

"not napped" under heading 6302 of the Harmonized Tariff Schedule Annotated ("HTSUSA"). Upon review, Customs has determined that the bed linen was erroneously classified. The correct classification for the product should be under heading 6302, HTSUSA, as napped bed linen. NY D87089 is hereby revoked for the reasons set forth below.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice was published on March 14, 2001, in Vol. 35, No. 11 of the CUSTOMS BULLETIN, proposing to revoke NY D87089 and to revoke the treatment pertaining to the classification of napped bed linen. The only comment received was in favor of the action.

Facts:

According to NY D87089, you submitted a sample of a sheet set, referred to as the "Wildflower Queen Sized Sheet Set" item number 077–7331. The set consists of a flat sheet, fitted sheet and two pillowcases. They are made from a 100 percent cotton woven fabric that has been printed with a floral design. You state that this fabric will also be used for the comforter cover. The flat sheet is hemmed on all four sides and the fitted sheet is fully elasticized. The sheet set will also be imported in twin size (item # 077–7329), full size (item # 077–7330) and king size (item # 077–7332). In addition to those contained in the sets, individual pillowcases will be imported separately in standard size (item # 077–7335) and king size (item # 077–7336). A sample of the comforter cover was not submitted and it is assumed that the cover does not contain any embellishments such as embroidery, lace, braid, edging, trimming, piping or applique work. The comforter covers will be imported in twin size (077–7325), full size (077–7326), queen size (077–7327) and king size (077–7328).

For tariff classification purposes, the difference between napped and not napped bed linen is less than 3 percent *ad valorem*, however, not napped printed bed linen from the European Union is currently subject to a 100 percent *ad valorem* rate of duty pursuant to trade sanctions imposed by the United States Trade Representative. [1]

Upon review, the classification applied by Customs in NY D87088 was incorrect. In NY D87089, the flat and fitted sheets were classified under subheading 6302.21.9020, HTSUSA, as "Other bed linen, printed: of cotton: not napped: sheets;" the pillowcases were classified under subheading 6302.21.9010, HTSUSA, as "Other bed linen, printed: of cotton: not napped: pillowcases;" and the comforter covers were classified under subheading 6302.21.9050, HTSUSA, as "Other bed linen, printed: of cotton: other: not napped: other."

Issue:

What is the proper classification for the described bed linen?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation ("GRI"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

The Explanatory Notes ("EN") to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. The EN state in regard to heading 6302, HTSUSA, that "bed linen" includes "sheets, pillowcases, bolster cases, eiderdown cases and mattress covers." As bed linen is *eo nomine* provided for within heading 6302, HTSUSA, classification within this heading is proper.

Under the terms of the HTSUSA, the classification of bed linen depends upon the fiber content; whether printed or not; whether napped or not; whether any component contains embroidery, trimming, lace, etc., and whether the sheet set constitutes a "retail" set or not. The determinative issue in this case is whether the subject sheets are considered napped or not napped for tariff classification purposes and specifically what level or amount of napping is required.

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[1] Please be advised that USTR issued a press release on April 11, 2001, which indicated the withdrawal of the 100 percent duties as of July 1, 2001. For further information regarding duty rates for goods imported from the European Union, please see the USTR website at <www.ustr.gov>.

Statistical Note 1(k) to Chapter 52 of the HTSUSA which provides for cotton states:

> The term "*napped*" means fabrics with a fuzzy, fibrous surface produced by scratching or pricking the surface so that some of the fibers are raised from the body of the yarn. Napped fabrics are not to be confused with pile fabrics. Outing and canton flannel, moleskin, etc. are typical fabrics with a nap.

Determination of the tariff classification of the subject merchandise requires an understanding of terminology which is germane to the issue and utilized by the textile industry. We note the following definitions:

Nap	A downy surface given to a cloth when part of the fiber is raised from the basic structure. DICTIONARY OF FIBER & TEXTILE TECHNOLOGY 100 (1990).
Napping	A finishing process that raises the surface fibers of a fabric by means of passage over rapidly revolving cylinders covered with metal points or teasel burrs. DICTIONARY OF FIBER & TEXTILE TECHNOLOGY 100 (1990).
Napped Fabrics	Napped fabrics are processed so that they have either a slight or a dramatic nap on the face or both sides of the fabric. The napping process is accomplished by weaving loosely twisted yarns into the textile, which are then sheared and brushed to create the soft napped surface. Napped fabrics differ from PILE fabrics, in that they do not have extra threads incorporated in the textile. Napping is considered a FINISHING process and is used on many fibers, including manufactured fibers, silk and wool, as well as specialty fibers such as camel hair and mohair. Occasionally the napped effect does not continuously cover the fabric but is executed in stripes or figures. ENCYCLOPEDIA OF TEXTILES, Judith Jerde, 157 (1992).
Napped-Finished Goods	These may be of a single or double finish, *slight or heavy*. Single finish occurs when one side of the goods is napped; double finish fabric has both sides of the material napped. *A slight finish occurs when the napped cloth is not as high in protruding fibers nor as thick when compared with heavy nap.* The finish is given to fabrics known for their napped characteristics and for those that can withstand the rigors of the treatment. Certain woolen and cotton cloths receive this type of treatment—baby clothes, blankets, domett, flannel, lining, molleton, silence cloth, etc. The finish is applied by rollers covered with 1 inch card clothing similar to that used on the fancy roller of the woolen card, or by a roller clothed with teasels. Some fabrics are given from three to four up to ten or twelve roller treatments to obtain the desired napped effect for the surface finish. The napping may be done in the gray goods states as well as in the regular finishing operations. THE MODERN TEXTILE AND APPAREL DICTIONARY, George E. Linton, 386 (1973).

(emphasis added.)

Neither the Court of International Trade nor its predecessor, the Customs Court, have considered the issue of napping exclusive of making a distinction from pile. However, in *Tilton Textile Corp. v. United States*, 424 F.Supp 1053, 77 Cust. Ct. 27, C.D. 4670 (1976) *aff'd*, 565 F.2d 140 (1977), the court stated:

> [W]hat is termed a "nap" or "napped fabrics" is produced by the raising of *some of the fibers* of the threads which compose the basic fabric, whereas the "pile" on "pile fabrics" must be the raising at intervals, in the form of loops, the entire thickness of extra threads introduced into, but not essential to the basic fabric, which thus form an "uncut pile."

Tilton at 44. (emphasis added.) The Customs Court acknowledged that only *some of the fibers* must be raised on the fabric. Furthermore, Statistical Note 1(k), Chapter 52 to the

HTSUS which defines "napping" does not require that a specified amount of fibers must be raised in order to qualify as a napped good. Rather the Note requires that "*some* of the fibers" are raised.

The issue of what levels of napping are required in order to be considered "napped" for tariff classification purposes under the HTSUSA was based on the issuance of a ruling under the previous tariff. HQ 080945, dated July 20, 1988, dealt with the issue of whether cotton twill fabric was napped for purposes of the Tariff Schedule of the United States, the predecessor to the current Harmonized Tariff Schedule of the United States. HQ 080945 stated:

> Both technical literature and the Statistical Headnotes to the Tariff Schedules of the United States Annotated ("TSUSA") indicate that for a fabric to be known as *napped* it *must have a substantial portion* of at least one surface covered with raised fibers.

(emphasis added). However, review of Headnote 1(k), Subpart A, Part 3, Schedule 3 TSUSA, which is the relevant TSUSA Note on napped fabrics, reveals that HQ 080945 was in error. The TSUSA Note states:

> *Napped*: Fabrics with a fuzzy, fibrous surface produced by scratching or pricking the surface so that some of the fibers are raised from the body of the yarn. Napped fabrics are not to be confused with pile fabrics. Outing and canton fabrics, moleskin, etc., are typical fabrics with a nap.

See Headnote 1(k), Subpart A, Part 3, Schedule 3 TSUSA. The applicable note under the TSUSA only requires that *some* of the fibers are raised in the fabric to be napped. This is consistent with the HTSUSA as well as the *Tilton* decision.

The tariff does not require that a set amount of fibers must be raised in order to qualify as a napped product for classification purposes and therefore the U.S. Customs Service will not subjectively determine levels of napping which must be fulfilled for products to be classified as napped. While the napping on the subject merchandise is slight, the level of napping is still visible to the eye and has been accomplished through the brushing process which is necessary for the formation of all napping. Therefore, the subject merchandise is considered napped for tariff classification purposes.

Furthermore, classification of the subject merchandise as a set is inappropriate. GRI 3(b) provides for the classification of goods put up in sets for retail sale. The rule states, in pertinent part, as follows:

> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

Explanatory Note (X) (page 5) to GRI 3(b) states that the term "goods put up in sets for retail sale" means goods which:

> (a) consist of at least two different articles which are, prima facie, classifiable in different headings;
> (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
> (c) are put up in a manner suitable for sale directly to users without repacking.

In the instant case, the merchandise consists of products that, if imported separately, are not classifiable in the different headings of the HTSUSA and therefore, consideration of the merchandise as a set is inappropriate.

Holding:

NY D87089 is hereby revoked.

The subject pillowcases are properly classified in subheading 6302.21.7010, HTSUSA, as "Bed Linen, table linen, toilet linen and kitchen linen: Other bed linen, printed: Of cotton: Other: Napped: Pillowcases, other than bolster cases." The general column one rate of duty is 4 percent *ad valorem*. The textile restraint number is 360.

The subject flat and fitted sheets are properly classified in subheading 6302.21.7020, HTSUSA, as "Bed Linen, table linen, toilet linen and kitchen linen: Other bed linen, printed: Of cotton: Other: Napped: Sheets." The general column one rate of duty is 4 percent *ad valorem*. The textile restraint number is 361.

The subject comforter covers are properly classified in subheading 6302.21.7050, HTSUSA, as "Bed Linen, table linen, toilet linen and kitchen linen: Other bed linen, printed: Of

cotton: Other: Napped: Other." The general column one rate of duty is 4 percent *ad valorem*. The textile restraint number is 362.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, *The Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

Effect on Other Rulings:

NY D87089 is revoked. In accordance with 19 U.S.C. §1625 (c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

GAIL A. HAMILL,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 24, 2001.

CLA-2 RR:CR:TE 964823 mbg
Category: Classification
Tariff No. 6302.21.7010,
6302.21.7020 and 6302.21.7050

MS. KATHY BRENNAN
EDDIE BAUER INC.
P.O. Box 97000
Redmond, WA 98073-9700

Re: Napped Bed Linen from Portugal; Revocation of NY E81441.

DEAR MS. BRENNAN:

On May 19, 1999, Customs issued New York Ruling Letter ("NY") NY E81441 to Eddie Bauer, Inc., regarding the tariff classification of bed linen which was originally classified as "not napped" under heading 6302 of the Harmonized Tariff Schedule Annotated ("HTSUSA"). Upon review, Customs has determined that the bed linen was erroneously classified. The correct classification for the product should be under heading 6302, HTSUSA, as napped bed linen. NY E81441 is hereby revoked for the reasons set forth below.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), a notice was published on March 14, 2001, in Vol. 35, No. 11 of the CUSTOMS BULLETIN, proposing to revoke NY E81441 and to revoke the treatment pertaining to the classification of napped bed linen. The only comment received was in favor of the action.

Facts:

According to NY E81441, you submitted a swatch of printed percale fabric representative of the fabrics used to make the sheets, pillowcases, comforter covers and sheet sets. The 100 percent cotton woven fabric was stated to be identical to the production fabric differing only in the printed patterns. The flat and fitted sheets are imported in twin, full, queen and king sizes, while the pillowcases are imported in standard and king sizes. The Floral Flat sheets are referred to as item numbers 077-2817, 077-2818, 077-2819 and

077–2820. The Floral Fitted sheets are referred to as item numbers 077–2821, 077–2822, 077–2823 and 077–2824 and the Floral Pillowcases as 077–2825 and 077–2826. The Stripe Flat sheets are imported as item numbers 077–7700, 077–9926, 077–9927 and 077–9928. The Stripe Fitted sheets are imported as item numbers 077–9929, 077–9930, 077–9931 and 077–9932 and the Stripe Pillowcases as 077–9933 and 077–9934.

The Green Floral sheet set consists of a flat sheet, fitted sheet and two pillowcases. The sheet set is imported in twin size (item # 077–6904), full size (item # 077–6905) queen size (item # 077–6906) and king size (item # 077–6907). In addition to those contained in the sets, individual Green Floral pillowcases are imported separately in standard size (item # 077–6908) and king size (item # 077–6909). The Floral/Madras comforter covers are imported in twin size (077–3356), full size (077–3357), queen size (077–3358) and king size (077–3359). You have indicated that the sheets, pillowcases, comforter covers and sheet sets do not contain any embellishments such as embroidery, lace, braid, edging, trimming, piping or applique work.

For tariff classification purposes, the difference between napped and not napped bed linen is less than 3 percent *ad valorem*, however, not napped printed bed linen from the European Union is currently subject to a 100 percent *ad valorem* rate of duty pursuant to trade sanctions imposed by the United States Trade Representative. [1]

Upon review, the classification applied by Customs in NY E81441 was incorrect. In NY E81441, the flat and fitted sheets were classified under subheading 6302.21.9020, HTSUSA, as "Other bed linen, printed: of cotton: not napped: sheets;" the pillowcases were classified under subheading 6302.21.9010, HTSUSA, as "Other bed linen, printed: of cotton: not napped: pillowcases;" and the comforter covers were classified under subheading 6302.21.9050, HTSUSA, as "Other bed linen, printed: of cotton: other: not napped: other."

Issue:

What is the proper classification for the described bed linen?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation ("GRI"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

The Explanatory Notes ("EN") to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. The EN state in regard to heading 6302, HTSUSA, that "bed linen" includes "sheets, pillowcases, bolster cases, eiderdown cases and mattress covers." As bed linen is *eo nomine* provided for within heading 6302, HTSUSA, classification within this heading is proper.

Under the terms of the HTSUSA, the classification of bed linen depends upon the fiber content; whether printed or not; whether napped or not; whether any component contains embroidery, trimming, lace, etc., and whether the sheet set constitutes a "retail" set or not. The determinative issue in this case is whether the subject sheets are considered napped or not napped for tariff classification purposes and specifically what level or amount of napping is required.

Statistical Note 1(k) to Chapter 52 of the HTSUSA which provides for cotton states:

> The term "*napped*" means fabrics with a fuzzy, fibrous surface produced by scratching or pricking the surface so that some of the fibers are raised from the body of the yarn. Napped fabrics are not to be confused with pile fabrics. Outing and canton flannel, moleskin, etc. are typical fabrics with a nap.

Determination of the tariff classification of the subject merchandise requires an understanding of terminology which is germane to the issue and utilized by the textile industry. We note the following definitions:

Nap	A downy surface given to a cloth when part of the fiber is raised from the basic structure. DICTIONARY OF FIBER & TEXTILE TECHNOLOGY 100 (1990).

[1] Please be advised that USTR issued a press release on April 11, 2001, which indicated the withdrawal of the 100 percent duties as of July 1, 2001. For further information regarding duty rates for goods imported from the European Union, please see the USTR website at "www.ustr.gov".

Napping	A finishing process that raises the surface fibers of a fabric by means of passage over rapidly revolving cylinders covered with metal points or teasel burrs. DICTIONARY OF FIBER & TEXTILE TECHNOLOGY 100 (1990).
Napped Fabrics	Napped fabrics are processed so that they have either a slight or a dramatic nap on the face or both sides of the fabric. The napping process is accomplished by weaving loosely twisted yarns into the textile, which are then sheared and brushed to create the soft napped surface. Napped fabrics differ from PILE fabrics, in that they do not have extra threads incorporated in the textile. Napping is considered a FINISHING process and is used on many fibers, including manufactured fibers, silk and wool, as well as specialty fibers such as camel hair and mohair. Occasionally the napped effect does not continuously cover the fabric but is executed in stripes or figures. ENCYCLOPEDIA OF TEXTILES, Judith Jerde, 157 (1992).
Napped-Finished Goods	These may be of a single or double finish, *slight or heavy*. Single finish occurs when one side of the goods is napped; double finish fabric has both sides of the material napped. *A slight finish occurs when the napped cloth is not as high in protruding fibers nor as thick when compared with heavy nap.* The finish is given to fabrics known for their napped characteristics and for those that can withstand the rigors of the treatment. Certain woolen and cotton cloths receive this type of treatment—baby clothes, blankets, domett, flannel, lining, molleton, silence cloth, etc. The finish is applied by rollers covered with 1 inch card clothing similar to that used on the fancy roller of the woolen card, or by a roller clothed with teasels. Some fabrics are given from three to four up to ten or twelve roller treatments to obtain the desired napped effect for the surface finish. The napping may be done in the gray goods states as well as in the regular finishing operations. THE MODERN TEXTILE AND APPAREL DICTIONARY, George E. Linton, 386 (1973).

(emphasis added.)

Neither the Court of International Trade nor its predecessor, the Customs Court, have considered the issue of napping exclusive of making a distinction from pile. However, in *Tilton Textile Corp. v. United States*, 424 F.Supp 1053, 77 Cust. Ct. 27, C.D. 4670 (1976) *aff'd*, 565 F.2d 140 (1977), the court stated:

> [W]hat is termed a "nap" or "napped fabrics" is produced by the raising of *some of the fibers* of the threads which compose the basic fabric, whereas the "pile" on "pile fabrics" must be the raising at intervals, in the form of loops, the entire thickness of extra threads introduced into, but not essential to the basic fabric, which thus form an "uncut pile."

Tilton at 44. (emphasis added.) The Customs Court acknowledged that only *some of the fibers* must be raised on the fabric. Furthermore, Statistical Note 1(k), Chapter 52 to the HTSUS which defines "napping" does not require that a specified amount of fibers must be raised in order to qualify as a napped good. Rather the Note requires that "*some* of the fibers" are raised.

The issue of what levels of napping are required in order to be considered "napped" for tariff classification purposes under the HTSUSA was based on the issuance of a ruling under the previous tariff. HQ 080945, dated July 20, 1988, dealt with the issue of whether cotton twill fabric was napped for purposes of the Tariff Schedule of the United States, the predecessor to the current Harmonized Tariff Schedule of the United States. HQ 080945 stated:

> Both technical literature and the Statistical Headnotes to the Tariff Schedules of the United States Annotated ("TSUSA") indicate that for a fabric to be known as

> *napped* it *must have a substantial portion* of at least one surface covered with raised fibers.

(emphasis added). However, review of Headnote 1(k), Subpart A, Part 3, Schedule 3 TSUSA, which is the relevant TSUSA Note on napped fabrics, reveals that HQ 080945 was in error. The TSUSA Note states:

> *Napped:* Fabrics with a fuzzy, fibrous surface produced by scratching or pricking the surface so that some of the fibers are raised from the body of the yarn. Napped fabrics are not to be confused with pile fabrics. Outing and canton fabrics, moleskin, etc., are typical fabrics with a nap.

See Headnote 1(k), Subpart A, Part 3, Schedule 3 TSUSA. The applicable Note under the TSUSA only requires that *some* of the fibers are raised in the fabric to be napped. This is consistent with the HTSUSA as well as the *Tilton* decision.

The tariff does not require that a set amount of fibers must be raised in order to qualify as a napped product for classification purposes and therefore the U.S. Customs Service will not subjectively determine levels of napping which must be fulfilled for products to be classified as napped. While the napping on the subject merchandise is slight, the level of napping is still visible to the eye and has been accomplished through the brushing process which is necessary for the formation of all napping. Therefore, the subject merchandise is considered napped for tariff classification purposes.

Furthermore, classification of the subject merchandise as a set is inappropriate. GRI 3(b) provides for the classification of goods put up in sets for retail sale. The rule states, in pertinent part, as follows:

> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

Explanatory Note (X) (page 5) to GRI 3(b) states that the term "goods put up in sets for retail sale" means goods which:

> (a) consist of at least two different articles which are, prima facie, classifiable in different headings;
> (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
> (c) are put up in a manner suitable for sale directly to users without repacking.

In the instant case, the merchandise consists of products that, if imported separately, are not classifiable in the different headings of the HTSUSA and therefore, consideration of the merchandise as a set is inappropriate.

Holding:

NY E81441 is hereby revoked.

The subject pillowcases are properly classified in subheading 6302.21.7010, HTSUSA, as "Bed Linen, table linen, toilet linen and kitchen linen: Other bed linen, printed: Of cotton: Other: Napped: Pillowcases, other than bolster cases." The general column one rate of duty is 4 percent *ad valorem*. The textile restraint number is 360.

The subject flat and fitted sheets are properly classified in subheading 6302.21.7020, HTSUSA, as "Bed Linen, table linen, toilet linen and kitchen linen: Other bed linen, printed: Of cotton: Other: Napped: Sheets." The general column one rate of duty is 4 percent *ad valorem*. The textile restraint number is 361.

The subject comforter covers are properly classified in subheading 6302.21.7050, HTSUSA, as "Bed Linen, table linen, toilet linen and kitchen linen: Other bed linen, printed: Of cotton: Other: Napped: Other." The general column one rate of duty is 4 percent *ad valorem*. The textile restraint number is 362.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, *The Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local

Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

Effect on Other Rulings:

NY E81441 is revoked. In accordance with 19 U.S.C. §1625 (c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

GAIL A. HAMILL,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 24, 2001.

CLA–2 RR:CR:TE 964819 mbg
Category: Classification
Tariff No. 6302.21.7020 and 6302.31.7020

MR. JAMES O. CRAWFORD
JOHN S. JAMES CO.
P.O. Box 1616
Wilmington, NC 28401

Re: Napped Bed Sheets; Modification of NY F83310.

DEAR MR. CRAWFORD:

On March 15, 2000, Customs issued New York Ruling Letter ("NY") NY F83310 to your company on behalf of your client, Induter USA Inc., regarding the tariff classification of bed linen which was originally classified as "not napped" under heading 6302 of the Harmonized Tariff Schedule Annotated ("HTSUSA"). Upon review, Customs has determined that the bed linen was erroneously classified. The correct classification for the product should be under heading 6302, HTSUSA, as napped bed linen. NY F83310 is hereby modified for the reasons set forth below.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice was published on March 14, 2001, in Vol. 35, No. 11 of the CUSTOMS BULLETIN, proposing to modify NY F83310 and to revoke the treatment pertaining to the classification of napped bed linen. The only comment received was in favor of the action.

Facts:

Samples of these flat sheets made from 100 percent cotton woven fabrics were erroneously classified. In NY F83310 the samples were described as follows:

Sample Ref # 1—napped and printed
Sample Ref # 5—printed and not napped
Sample Ref # 9—printed and not napped
Sample Ref # 15—not napped and not printed.

In addition, NY F83310 states that none of the samples contain any embroidery, lace, braid, edging, trimming, piping or applique work.

For tariff classification purposes, the difference between napped and not napped bed linen is less than 3 percent *ad valorem*, however, not napped printed bed linen from the Euro-

pean Union is currently subject to a 100 percent *ad valorem* rate of duty pursuant to trade sanctions imposed by the United States Trade Representative. [1]

Upon review the classification applied by Customs in NY F83310 was incorrect. In NY F83310, Sample Ref # 5 and Sample Ref # 9 were classified under subheading 6302.21.9020, HTSUSA, as "Other bed linen: printed: of cotton: not napped: sheets," while Sample Ref # 15 was classified under subheading 6302.31.9020, HTSUSA, as "Other bed linen: of cotton: not napped: sheets" The classification of Sample Ref # 1 in subheading 6302.21.7020, HTSUSA, as "Other bed linen: printed: of cotton: other: napped: sheets" remains unaffected by this ruling.

Issue:

What is the proper classification for the described bed sheets?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation ("GRI"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

The Explanatory Notes ("EN") to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. The EN state in regard to heading 6302, HTSUSA, that "bed linen" includes "sheets, pillowcases, bolster cases, eiderdown cases and mattress covers." As bed linen is *eo nomine* provided for within heading 6302, HTSUSA, classification within this heading is proper.

Under the terms of the HTSUSA, the classification of bed linen depends upon the fiber content; whether printed or not; whether napped or not; whether any component contains embroidery, trimming, lace, etc., and whether the sheet set constitutes a "retail" set or not. The determinative issue in this case is whether the subject sheets are considered napped or not napped for tariff classification purposes and specifically what level or amount of napping is required.

Statistical Note 1(k) to Chapter 52 of the HTSUSA which provides for cotton states:

> The term "*napped*" means fabrics with a fuzzy, fibrous surface produced by scratching or pricking the surface so that some of the fibers are raised from the body of the yarn. Napped fabrics are not to be confused with pile fabrics. Outing and canton flannel, moleskin, etc. are typical fabrics with a nap.

Determination of the tariff classification of the subject merchandise requires an understanding of terminology which is germane to the issue and utilized by the textile industry. We note the following definitions:

Nap	A downy surface given to a cloth when part of the fiber is raised from the basic structure. DICTIONARY OF FIBER & TEXTILE TECHNOLOGY 100 (1990).
Napping	A finishing process that raises the surface fibers of a fabric by means of passage over rapidly revolving cylinders covered with metal points or teasel burrs. DICTIONARY OF FIBER & TEXTILE TECHNOLOGY 100 (1990).
Napped Fabrics	Napped fabrics are processed so that they have either a slight or a dramatic nap on the face or both sides of the fabric. The napping process is accomplished by weaving loosely twisted yarns into the textile, which are then sheared and brushed to create the soft napped surface. Napped fabrics differ from PILE fabrics, in that they do not have extra threads incorporated in the textile. Napping is considered a FINISHING process and is used on many fibers, including manufactured fibers, silk and wool, as well as specialty fibers such as camel hair and mohair. Occasionally the napped effect does not con-

[1] Please be advised that USTR issued a press release on April 11, 2001, which indicated the withdrawal of the 100 percent duties as of July 1, 2001. For further information regarding duty rates for goods imported from the European Union, please see the USTR website at "www.ustr.gov".

tinuously cover the fabric but is executed in stripes or figures. ENCYCLOPEDIA OF TEXTILES, Judith Jerde, 157 (1992).

Napped-Finished Goods

These may be of a single or double finish, *slight or heavy.* Single finish occurs when one side of the goods is napped; double finish fabric has both sides of the material napped.

A slight finish occurs when the napped cloth is not as high in protruding fibers nor as thick when compared with heavy nap. The finish is given to fabrics known for their napped characteristics and for those that can withstand the rigors of the treatment. Certain woolen and cotton cloths receive this type of treatment—baby clothes, blankets, domett, flannel, lining, molleton, silence cloth, etc.

The finish is applied by rollers covered with 1 inch card clothing similar to that used on the fancy roller of the woolen card, or by a roller clothed with teasels.

Some fabrics are given from three to four up to ten or twelve roller treatments to obtain the desired napped effect for the surface finish. The napping may be done in the gray goods states as well as in the regular finishing operations. THE MODERN TEXTILE AND APPAREL DICTIONARY, George E. Linton, 386 (1973).

(emphasis added.)

Neither the Court of International Trade nor its predecessor, the Customs Court, have considered the issue of napping exclusive of making a distinction from pile. However, in *Tilton Textile Corp. v. United States*, 424 F.Supp 1053, 77 Cust. Ct. 27, C.D. 4670 (1976) *aff'd*, 565 F.2d 140 (1977), the court stated:

> [W]hat is termed a "nap" or "napped fabrics" is produced by the raising of *some of the fibers* of the threads which compose the basic fabric, whereas the "pile" on "pile fabrics" must be the raising at intervals, in the form of loops, the entire thickness of extra threads introduced into, but not essential to the basic fabric, which thus form an "uncut pile."

Tilton at 44. (emphasis added.) The Customs Court acknowledged that only *some of the fibers* must be raised on the fabric. Furthermore, Statistical Note 1(k), Chapter 52 to the HTSUS which defines "napping" does not require that a specified amount of fibers must be raised in order to qualify as a napped good. Rather the Note requires that "*some* of the fibers" are raised.

The issue of what levels of napping are required in order to be considered "napped" for tariff classification purposes under the HTSUSA was based on the issuance of a ruling under the previous tariff. HQ 080945, dated July 20, 1988, dealt with the issue of whether cotton twill fabric was napped for purposes of the Tariff Schedule of the United States, the predecessor to the current Harmonized Tariff Schedule of the United States. HQ 080945 stated:

> Both technical literature and the Statistical Headnotes to the Tariff Schedules of the United States Annotated ("TSUSA") indicate that for a fabric to be known as *napped* it *must have a substantial portion* of at least one surface covered with raised fibers.

(emphasis added). However, review of Headnote 1(k), Subpart A, Part 3, Schedule 3 TSUSA, which is the relevant TSUSA Note on napped fabrics, reveals that HQ 080945 was in error. The TSUSA Note states:

> *Napped:* Fabrics with a fuzzy, fibrous surface produced by scratching or pricking the surface so that some of the fibers are raised from the body of the yarn. Napped fabrics are not to be confused with pile fabrics. Outing and canton fabrics, moleskin, etc., are typical fabrics with a nap.

See Headnote 1(k), Subpart A, Part 3, Schedule 3 TSUSA. The applicable Note under the TSUSA only requires that *some* of the fibers are raised in the fabric to be napped. This is consistent with the HTSUSA as well as the *Tilton* decision.

Research in various textile sources as well as analysis by laboratory experts reveals that the subject merchandise has been subjected to a low level of brushing which has created a

napped effect on the bed linen. Upon receipt of this request, Customs subjected the merchandise to further lab analysis and the Customs laboratory confirmed the importer's own lab report which claims the subject merchandise is a woven, napped fabric albeit with a low level of napping evident.

The tariff does not require that a set amount of fibers must be raised in order to qualify as a napped product for classification purposes and therefore the U.S. Customs Service will not subjectively determine levels of napping which must be fulfilled for products to be classified as napped. While the napping on the subject merchandise is slight, the level of napping is still visible to the eye and has been accomplished through the brushing process which is necessary for the formation of all napping. Therefore, the subject merchandise is considered napped for tariff classification purposes.

Holding:

NY F83310 is hereby modified.

Sample Ref # 5 and Sample Ref # 9 are properly classified in subheading 6302.21.7020, HTSUSA, as "Bed Linen, table linen, toilet linen and kitchen linen: Other bed linen, printed: Of cotton: Other: Napped: Sheets." The general column one rate of duty is 4 percent *ad valorem*. The textile restraint number is 361.

Sample Ref # 15 is properly classified in subheading 6302.31.7020, HTSUSA, as "Bed Linen, table linen, toilet linen and kitchen linen: Other bed linen: Of cotton: Other: Napped: Sheets" The general column one rate of duty is 4.9 percent *ad valorem*. The textile restraint number is 361.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, *The Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

Effect on Other Rulings:

NY F83310 is modified. In accordance with 19 U.S.C. §1625 (c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

GAIL A. HAMILL,
(for John Durant, Director,
Commercial Rulings Division.)

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 4, 24, 101

RIN 1515–AC63

USER AND NAVIGATION FEES; OTHER REIMBURSEMENT CHARGES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations regarding the proper assessment of user and navigation fees, as well as other reimbursement charges for Customs services performed in connection with, among other things, the processing of vehicles, vessels, aircraft and merchandise arriving in the United States. It is believed that the proposed amendments would conform the regulations with the intent of the Customs user fee statute. The proposed amendments also reflect existing operational policy and administrative practice in this area.

DATES: Comments must be received on or before July 2, 2001.

ADDRESSES: Written comments may be addressed to and inspected at the Regulations Branch, U.S. Customs Service, 1300 Pennsylvania Avenue, NW., 3rd Floor, Washington, D.C. 20229

FOR FURTHER INFORMATION CONTACT: Kimberly Nott, Office of Field Operations, 202–927–1364.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Customs user fee statute, codified at 19 U.S.C. 58c, authorizes a schedule of fees that are chargeable to users of various services provided by Customs in connection with the activities that are listed in section 58c(a). Under the user fee statute, in pertinent part, a fee is charged to reimburse the Government for Customs services that are provided, among other things, for processing certain vehicles, vessels, aircraft and merchandise that arrive in the United States. In particular, a user

fee is charged for Customs services that are provided in connection with the arrival of a commercial vessel of 100 net tons or more (19 U.S.C. 58c(a)(1)), and in connection with the arrival of a private vessel or private aircraft (19 U.S.C. 58c(a)(4)).

DEFINITION OF ARRIVAL FOR PURPOSES OF THE USER FEE STATUTE

For purposes of the applicability of a user fee for providing Customs services in connection with the arrival of a vessel or aircraft as described above, the statute generally defines the term "arrival" as being an arrival that occurs within a port of entry in the Customs territory of the United States (19 U.S.C. 58c(c)(2)). Each Customs port of entry has specific geographical limits that are defined by regulation (19 CFR 101.3(b)).

Section 58c is implemented by § 24.22, Customs Regulations (19 CFR 24.22). Section 24.22(a)(2), however, defines the term "arrival" as being an arrival within a Customs port of entry or any place serviced by any such port. Customs has concluded that this definition of arrival is overbroad and conflicts with a more suitable definition of arrival in section 58c, which, on its face, clearly does not mean to require the assessment of a user fee at every location serviced by Customs.

Accordingly, Customs proposes to amend § 24.22(a)(2) to define an arrival as occurring at any place within the limits of a Customs port of entry or at a designated Customs station. A Customs station is any place other than a port of entry where Customs officers or employees are lawfully stationed to enter and clear vessels, accept entries of merchandise, collect duties, and enforce the various provisions of the Customs and navigation laws of the United States (19 CFR 101.1). However, under the proposed amendment, for purposes of the applicability of user fees in accordance with 19 U.S.C. 58c(c)(2), a Customs station would essentially be considered as the functional equivalent of a Customs port of entry. The definition of "Customs station" in § 101.1, Customs Regulations (19 CFR 101.1) would be amended to conform with this.

A list of places that have been designated as Customs stations appears in § 101.4(c), Customs Regulations (19 CFR 101.4(c)); also, Customs stations may be temporarily designated as such by the port director as provided in § 101.4(d), Customs Regulations (19 CFR 101.4(d)).

Customs believes that the definition of arrival in proposed § 24.22(a)(2) would conform with the intent of the user fee statute. Moreover, it reflects existing Customs operational policy and administrative practice in this area. Further, the definition would simplify the collection of user fees by listing the specific locations where only these fees are applicable and must be assessed for Customs services.

In this latter respect, where user fees are assessed under section 58c, the law is quite clear that no charges other than user fees may be collected to reimburse the Government for any cargo inspection, clearance, or other Customs activity, expense or service performed (even on an overtime basis); or for any Customs personnel provided in connection with the arrival or departure of a commercial vessel, or its passen-

gers, crew, stores, material, or cargo, for the United States (19 U.S.C. 58c(e)(6)(A)(i) and (ii)).

USER FEES, NAVIGATION FEES, OTHER REIMBURSEMENT CHARGES; ARRIVAL OF COMMERCIAL VESSEL

In cases where Customs user fees do not apply, the cost of Customs services is reimbursable to the Government under the circumstances and to the extent otherwise specifically authorized in the law. The specific circumstances where the cost of Customs services would be otherwise reimbursable to the Government are described in § 24.17, Customs Regulations (19 CFR 24.17). Furthermore, certain navigation fees for vessels, as listed in § 4.98, Customs Regulations (19 CFR 4.98), may be assessed as well, to the extent they are also applicable (19 CFR 24.21(b)(1)).

The services listed in § 4.98(a)(1) for which a navigation fee is applicable relate to the arrival of any vessel. However, § 4.98(a) would conflict with proposed § 24.22(a)(2), and with the user fee statute, insofar as it also requires the collection of a navigation fee for Customs services that are provided in connection with the arrival of a commercial vessel of 100 net tons or more or any private vessel in a Customs port of entry or a designated Customs station where, as already mentioned, a user fee would apply (19 U.S.C. 58c(a)(1)). The user fee would of course include Customs services as enumerated in § 4.98(a)(1). Accordingly, it is proposed to amend the introductory text of paragraph (a)(1) in § 4.98 to exclude the assessment of navigation fees on commercial vessels of 100 net tons or more and on any private vessels that arrive within a Customs port of entry or a designated Customs station, where user fees would apply to these vessels.

In addition, § 24.17(a)(4), Customs Regulations (19 CFR 24.17(a)(4)), currently requires that the owner, master, or agent of a vessel sought to be entered must reimburse the Government for the salary and expenses of any Customs officer or employee stationed at or sent to a designated Customs station or any other place that is not a port of entry for services rendered in connection with the entry or clearance of the vessel.

As such, § 24.17(a)(4) would also be in conflict with the definition of arrival in proposed § 24.22(a)(2), and with the user fee statute, to the extent that it requires reimbursement other than user fees at a designated Customs station. Accordingly, it is proposed to revise § 24.17(a)(4) to require reimbursement for services afforded by Customs at any place that is not a port of entry or a designated Customs station. For the same reason, §§ 24.17(a)(5) and 101.4(b)(3) would be similarly revised.

USER FEES, OTHER REIMBURSEMENT CHARGES; ARRIVAL OF PRIVATE VESSEL OR PRIVATE AIRCRAFT

Section 58c(a)(4), as noted, provides for an annual user fee to cover Customs services that must be furnished in processing the arrival of a private vessel or private aircraft. Section 24.22(e)(1), which imple-

ments this provision, requires, however, that, notwithstanding payment of the user fee under section 58c, all overtime charges provided for Customs services remain payable as well. Again, as previously discussed, the user fee statute precludes the assessment of other charges, including charges for overtime services, where user fees are applicable (19 U.S.C. 58c(e)(6)(A)(i)). Accordingly, it is proposed to amend § 24.22(e)(1) by removing the provision allowing for the collection of overtime charges.

COMMENTS

Before adopting this proposal as a final rule, consideration will be given to any written comments that are timely submitted to Customs. Customs specifically requests comments on the clarity of this proposed rule and how it may be made easier to understand. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, U.S. Customs Service, 1300 Pennsylvania Avenue, NW., 3rd Floor, Washington, D.C.

REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

The proposed amendments are intended to conform with statutory law, reflect existing Customs operational policy and administrative practice, and simplify the collection of user fees by listing the specific locations where only these fees are applicable and must be assessed for Customs services. Accordingly, it is certified, in accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), that, if adopted, the proposed rule will not have a significant economic impact on a substantial number of small entities. Nor do the proposed amendments meet the criteria for a "significant regulatory action" under E.O. 12866.

LIST OF SUBJECTS

19 CFR Part 4

Arrival, Cargo vessels, Common carriers, Customs duties and inspection, Entry, Fees, Fishing vessels, Freight, Harbors, Imports, Landing, Maritime carriers, Merchandise, Passenger vessels, Reporting and recordkeeping requirements, Shipping, Vessels.

19 CFR Part 24

Customs duties and inspection, Fees, Harbors, Reporting and recordkeeping requirements, User fees.

19 CFR Part 101

Customs duties and inspection, Customs ports of entry, Harbors, Reporting and recordkeeping requirements, User fees.

PROPOSED AMENDMENTS TO THE REGULATIONS

It is proposed that parts 4, 24, and 101, Customs Regulations (19 CFR parts 4, 24, and 101) be amended as set forth below.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority citation for part 4 would continue to read as follows, and the specific authority citation for § 4.98 would be revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 46 U.S.C. App. 3, 91;

* * * * * * *

Section 4.98 also issued under 19 U.S.C. 58a;

* * * * * * *

2. It is proposed to amend § 4.98 by revising the introductory text of paragraph (a)(1) to read as follows:

§ 4.98 Navigation fees.

(a)(1) The Customs Service will publish a General Notice in the Federal Register and Customs Bulletin periodically, setting forth a revised schedule of navigation fees for the following services provided to commercial vessels of 100 net tons or more and any private vessels that arrive at a place other than a Customs port of entry or a designated Customs station and to commercial vessels of less than 100 net tons that arrive anywhere in the United States, including a Customs port of entry or a designated Customs station:

* * * * * * *

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The general and relevant specific authority citations for part 24 would continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58a–58c, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1505, 1624; 26 U.S.C. 4461, 4462; 31 U.S.C. 9701.

* * * * * * *

Section 24.17 also issued under 19 U.S.C. 261, 267, 1450, 1451, 1452, 1456, 1524, 1557, 1562; 46 U.S.C. 2110, 2111, 2112 ;

* * * * * * *

2. It is proposed to amend § 24.17 by revising the first sentence of paragraph (a)(4) and by revising paragraph (a)(5) to read as follows:

§ 24.17 Reimbursable services of Customs employees.

(a) * * *

(4) When a Customs employee is assigned pursuant to § 101.4 of this chapter to a place which is not a port of entry or a designated Customs station for service in connection with the entry or clearance of a vessel, the owner, master, or agent of the vessel will be charged the full compensation and authorized travel and subsistence expenses of such employee from the time he leaves his official station until he returns. * * *

(5) When a Customs employee is assigned under the authority of section 447, Tariff Act of 1930, to make entry of a vessel at a place other than a port of entry or designated Customs station or to supervise the unlading of cargo, the private interest will be charged the full compensation and authorized travel and subsistence expenses of such employee from the time he leaves his official station until he returns.

* * * * * * *

3. It is proposed to amend § 24.22 by revising paragraph (a)(2) to read as set forth below; and by removing the last sentence of paragraph (e)(1):

§ 24.22 Fees for certain services.

(a) *Definitions.* * * *

* * * * * * *

(2) The term *arrival* means arrival at any place within the limits of a port of entry in the Customs territory of the United States, at any designated Customs station as listed in § 101.4(c) of this chapter, or at any temporary Customs station designated by the port director under § 101.4(d) of this chapter.

* * * * * * *

PART 101—GENERAL PROVISIONS

1. The general and relevant specific sectional authority citations for part 101 would continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 2, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1623, 1624, 1646a.

Sections 101.3 and 101.4 also issued under 19 U.S.C. 1 and 58b;

* * * * * * *

2. It is proposed to amend § 101.1 by revising the definition for "Customs station" to read as follows:

§ 101.1 Definitions.

* * * * * * *

Customs station. Other than for purposes of assessing user fees under 19 U.S.C. 58c where a "Customs station" is the functional equivalent of a port of entry, a "Customs station" is any place, other than a port of entry, at which Customs officers or employees are stationed, under the authority contained in article IX of the President's Message of March 3, 1913 (T.D. 33249), to enter and clear vessels, accept entries of merchandise, collect duties, and enforce the various provisions of the Customs and navigation laws of the United States.

* * * * * * *

3. It is proposed to amend § 101.4 by revising the section heading, paragraph (b), introductory text, and paragraph (b)(3) to read as follows:

§ 101.4 Entry and clearance of vessels at Customs stations and places other than a port of entry.

* * * * * * *

(b) *Authorization to enter.* Authorization to enter or be cleared at a Customs station, or any other place that is not a port of entry, will be granted by the director of the port under whose jurisdiction the station or place falls provided the port director is notified in advance of the arrival of the vessel concerned and the following conditions are met:

* * * * * * *

(3) The owner, master, or agent of a vessel sought to be entered at a place other than a port of entry or designated Customs station reimburses the Government for the salary and expenses of the Customs officer or employee stationed at or sent to such other place which is not a port of entry or a designated Customs station for services rendered in connection with the entry or clearance of the vessel, and

* * * * * * *

RAYMOND W. KELLY,
Commissioner of Customs.

Approved: October 26, 2000.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, May 1, 2001 (66 FR 21705)]

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

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Donald C. Pogue
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Clerk

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* Effective April 1, 2001

Decisions of the United States Court of International Trade

(Slip Op. 01–50)

PROSEGUR, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 94–08–00486

[Defendant's motion for partial summary judgment as to Court No. 95–10–01305 is granted.]

(Decided April 18, 2001)

Peter S. Herrick, for Plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General, *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, *John J. Mahon*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; and *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, U. S. Customs Service, Of Counsel, for Defendant.

OPINION

POGUE, *Judge:* Plaintiff, Prosegur, Inc. ("Prosegur"), challenges the refusal of the United States Customs Service ("Customs") to reliquidate certain jewelry entered at the port of Miami, Florida.[1] Prosegur contends that the imported merchandise should have been classified under subheading 9801.00.10,[2] Harmonized Tariff Schedule of the United States ("HTSUS"), free of duty, rather than under subheading 7113.19,[3] HTSUS. Merchandise classified under subheading 7113.19, HTSUS, is dutiable at 6.5% *ad valorem*. Pursuant to USCIT Rule 56, Customs requests dismissal of Court No. 95–10–01305 for lack of jurisdiction and/or failure to state a claim on which relief could be granted. Prosegur opposes the motion, claiming that factual disputes preclude the grant of summary judgment.

[1] This action, Consolidated Court No. 94–08–00486, includes Court No. 95–10–01305. Defendant's summary judgment requests the severance and dismissal of only part of the action, Court No. 95–10–01305.

[2] Subheading 9801.00.10 refers to, "Products of the United States when returned after having been exported without having been advanced in value or improved in condition by any process of manufacture or other means while abroad." 9801.00.10, HTSUS.

[3] Subheading 7113.19 refers to, "Articles of jewelry and parts thereof, of precious metals or of metal clad with precious metals." 7113.19, HTSUS.

BACKGROUND

On April 3, 1992, Prosegur imported jewelry under entry number 459–0101159–8. Prosegur attached a "Declaration for Free Entry of Returned American Products" to the entry form. Nonetheless, Customs liquidated the goods on August 13, 1993, under subheading 7113.19, HTSUS, assessing a duty of 6.5% *ad valorem*.

In a letter dated March 18, 1994, Prosegur notified Customs that, according to Prosegur, Customs did not properly liquidate the goods. Customs treated the letter as a "protest," and denied it as untimely as it was filed more than ninety days after the August 13th liquidation. *See* 19 U.S.C. §§ 1514(a), (c).[4] Pursuant to 19 U.S.C. § 1520(c)(1), Prosegur then filed a claim for reliquidation.[5]

Prosegur appears to make two arguments; first, that Customs did not act to extend the period of liquidation. As a result, Prosegur argues that the imported goods were deemed liquidated by law one year after their entry at the rate asserted at the time of entry, in this case duty free. *See* 19 U.S.C. § 1504(a).[6] Prosegur also appears to argue that Customs, through a mistake of fact, misclassified the goods as dutiable, rather than duty free, as supported by Prosegur's declaration of the duty free nature of the goods.

Customs, on the other hand, argues that it extended the period of liquidation twice. It also claims that Prosegur was notified, prior to liquidation, that the information on the duty free nature of the goods was incomplete. As a result, Customs contends that it properly extended the

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[4] 19 U.S.C. § 1514(a) states, in relevant part:

(a) Finality of decisions; return of papers

* * * * * * *

[D]ecisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—

* * * * * * *

(2) the classification and rate and amount of duties chargeable;

* * * * * * *

(5) the liquidation or reliquidation of an entry, or any modification thereof;

* * * * * * *

shall be final and conclusive upon all persons * * * unless a protest is filed in accordance with this section * * *.

19 U.S.C. § 1514(a)(1988).

According to 19 U.S.C. § 1514(c)(2), "[a] protest of a decision, order, or finding described in subsection (a) of this section shall be filed with such Customs officer within ninety days after but not before— (A) notice of liquidation or reliquidation * * *." 19 U.S.C. § 1514(c)(2)(1988)(redesignated 1514(c)(3) in 1993).

[5] 19 U.S.C. § 1520(c)(1) states:

Notwithstanding a valid protest was not filed, the appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate an entry or reconciliation to correct—

(1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction * * *.

19 U.S.C. § 1520(c)(1)(1988).

[6] Prosegur relies on section 1504(a)("Liquidation"), which states, in relevant part:

(a) Liquidation

Except as provided in subsection (b) of this section, an entry of merchandise not liquidated within one year from:

(1) the date of entry of such merchandise;

* * * * * * *

shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer of record.

19 U.S.C. § 1504(a)(1988)(sections (2) and (3) omitted).

liquidation period, and that it did not commit a mistake of fact by classifying the goods as dutiable. Rather, according to Customs, it considered two available options—classifying the goods as American Goods Returned; or denying that classification and choosing instead subheading 7113.19 because of insufficient documentation—and chose the classification it found more appropriate. In Customs' view, the appropriate manner of contesting the classification was for Prosegur to file a valid protest under 19 U.S.C. § 1514(a), which Prosegur failed to do.

STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." USCIT Rule 56. A dispute is genuine "if the evidence is such that [the trier of fact] could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The court resolves any doubt over material factual issues in favor of the nonmoving party, and draws all reasonable inferences in its favor. *See Anderson*, 477 U.S. at 255; *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390–91 (Fed. Cir. 1987). Nevertheless, "[w]hen a motion for summary judgment is made and supported * * * an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but * * * must set forth specific facts showing that there is a genuine issue for trial." USCIT Rule 56(e).

There are two issues in this case: (1) whether Prosegur makes the minimum showing that Customs did not extend the period of liquidation, and (2) whether the criteria for relief under section 1520(c)(1) can be met. Here, Prosegur failed to set forth any fact from which the court could infer that the liquidation period was not extended, and, therefore, did not offer evidence from which the court could rebut the presumption that Customs satisfactorily performed its duties. In addition, if the claimed misclassification of the imported jewelry as dutiable rather than duty free was an error, it was an error in the construction of law, not a mistake of fact. As a result, there are no genuine issues of material fact in dispute and, therefore, summary judgment is appropriate.

DISCUSSION

A. *Customs Properly Extended the Period of Liquidation*

1. Notice of Extension of Liquidation

Unless Customs extends the period of liquidation,[7] imported merchandise is to be liquidated within one year of its entry date. Otherwise, the imported goods are deemed liquidated at the rate asserted by the importer of record at the time of entry. *See* 19 U.S.C. § 1504(a). Customs extends the time within which it may liquidate goods by giving notice to

[7] Liquidation is "the final computation or ascertainment of the duties or drawback accruing on an entry." 19 CFR 159.1 (1994). It is intended to be the final determination of all issues relating to the admissibility and dutiability of goods. *See United States v. Utex Int'l, Inc.*, 857 F.2d 1408, 1409 (Fed. Cir. 1988).

the importer of record in accordance with section 1504(b). Customs may only extend the period of liquidation under three specific circumstances, including when "information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer." 19 U.S.C. § 1504(b)(1).[8]

Prosegur argues that Customs never extended the liquidation period. Consequently, according to Prosegur, the goods were deemed liquidated by law on April 3, 1993, one year after the goods were entered into the United States, as duty free, the rate Prosegur asserted at the time of entry. Prosegur rests its argument entirely on information it received from Customs, pursuant to the Freedom of Information Act ("FOIA"). Prosegur requested copies of the entry summary, commercial invoices, packing lists, Customs Forms ("CF") 28 and 29,[9] and all other documents pertaining to the imported merchandise at issue. *See* Letter from Peter S. Herrick, at Pl.'s Mem. Opp'n to Mot. Summ. J., Composite Ex. A. Customs responded to Prosegur's FOIA request, but did not send a copy of the electronic history file, which contains records of extension notices, CF 28s and 29s. Prosegur argues that the court should infer from the lack of a copy of the electronic history file that the extension notices were never mailed.

Customs officials are "entitled to a presumption that their duties are performed in the manner required by law." *International Cargo & Sur. Ins. Co. v. United States*, 15 CIT 541, 544, 779 F. Supp. 174, 177 (1991). In this case, the presumption arises that Customs sent notices extending the period of liquidation to the importer, Prosegur. This presumption can be "rebutted by a declaration or other evidence indicating that notice was not received." *Id.* Previously, "this court found that an affidavit from the importer's recordkeeper, stating that an extension notice had not been received, was sufficient to rebut the presumption." *Id.* (referring to *Enron Oil Trading & Transp. Co. v. United States*, 15 CIT 511, 516 (1991)). A mere "naked assertion," however, that the notice was not received does not rebut the presumption. *Id.* at 544–45, 779 F. Supp. at 177–78.

Defendant United States submitted affidavits from customs officials, a copy of the electronic history file containing the notices of extension, and a copy of the CF 29 sent to Prosegur. Arthur Versich, Project Leader of the Entry Processing Team, in his affidavit, described Customs' computerized database, the Automated Commercial System ("ACS"), used to generate extension notices. Versich explained that, due to the volume of extension and suspension notices, Customs does not maintain paper copies of notices sent to importers. *See* Affidavit of Arthur Versich ¶ 5, at Def.'s Mem. Supp. Mot. Summ. J., Collective Ex. A. Rather, the informa-

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[8] The other two circumstances under which Customs can extend the period of liquidation—when "liquidation is suspended as required by statute or court order" and when "the importer of record requests such extension and shows good cause therefore"—are not at issue here. 19 U.S.C. § 1504(b)(2)–(3).

[9] CF 28 is used by the district director to notify the importer if the entered rate or value of the merchandise is too low, specifying the difference in value on the notice. CF 29 is a notice of action that alerts the importer of a proposed change to the classification.

tion is stored in a computer file, known as the extension/suspension history file. *Id.*

Roger Odom, team leader in the Production Management Section of the Computer Operations Division of the Office of Information and Technology, described in his affidavit the process used to format, print, and send the extension notices. According to Odom, the computer and printing rooms are manned and operated twenty-four hours a day, seven days a week, and are closely supervised. *See* Affidavit of Roger Odom ¶ 4, at Def.'s Mem. Supp. Mot. Summ. J., Collective Ex. A. Customs runs a group of programs each week, after the end of the work week. These programs are known as "end-of-week" programs. Extension notices are one such end-of-week process. Every Sunday, extension notices, or CF 4333As, are printed. *See id.* at ¶ 5. The printed CF 4333As are then brought to the Reports Distribution area. *See id.* at ¶ 8. After a final check for defects, the notices are placed in Postal Service trays. *See id.* at ¶ 10. Within twenty-four hours of printing, the notices are then delivered to the post office.

The printing and mailing of the extension notices are operations that the data center "*must* perform *every* week." *Id.* at ¶ 11 (emphasis in original). Therefore, "there is no doubt that where Customs has a record of a notice, the notice was printed at or about the time indicated by the run data." Affidavit of Arthur Versich ¶ 16, at Def.'s Mem. Supp. Mot. Summ. J., Collective Ex. A.

Here, Customs' automated system records indicate that notices were sent to Prosegur. *Id.* at ¶ 7. Specifically, two extension notices are listed in Prosegur's file, dated January 16, 1993, and July 17, 1993. *See* Printout of History File, at Def.'s Mem. Supp. Mot. Summ. J., Collective Ex. A. These notices would have extended the period of liquidation to include the August liquidation data at issue.

Prosegur does not even make a "naked assertion" that the notices of extension were not received. Prosegur submits no statement or affidavit, e.g., of recordkeepers, that could raise an inference that it never received the notices. Rather, Prosegur asks the court to infer from an incomplete file obtained through a FOIA request, made some 6 months after the liquidation of the goods, that the extension notices were not sent.

Whatever the reasons why the history file was not included in the set of documents requested by Prosegur,[10] the court cannot infer from the failure to include the history file in the FOIA response, without any more evidence presented by Prosegur, that the extension notices and customs forms were never sent. *See St. Paul Fire & Marine Ins. Co. v. United States*, 21 CIT 953, 955 (1997)(quoting *Avia Group Int'l, Inc. v. L.A. Gear California, Inc.*, 853 F.2d 1557, 1560 (Fed. Cir. 1988)(noting that to survive summary judgment "a nonmovant must do more than

[10] For example, as argued by Customs, the official in charge of gathering the documents pursuant to Prosegur's FOIA request may not have conducted a thorough review of the file for the merchandise at issue. *See* Def.'s Reply Mem. Supp. Mot. Summ. J. at 6.

merely raise some doubt as to the existence of a fact; evidence must be forthcoming from the nonmovant * * *")). The FOIA response simply does not provide a basis for such an inference.

Customs' history file indicates that two notices of extension were sent. The routine office practice of mailing notices of extension within one week after the notices are generated, in the absence of any evidence that Prosegur never received its notices, is sufficient evidence of mailing in this case. Nothing in the affidavits submitted by Prosegur raise an inference that the notices were not sent or received. Therefore, Prosegur has failed to rebut the presumption that Customs properly produced and mailed the extension notices. Accordingly, the court finds that there is no genuine issue of material fact regarding this issue.

2. Validity of the Extensions

In order to uphold Customs' decision to extend the time of liquidation, the extension must be for a reason provided within 19 U.S.C. § 1504(b), specifically here, that "information * * * for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer." 19 U.S.C. § 1504(b)(1). The decision to extend the period of liquidation will be upheld as long as it is "proper under the statute, and is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *International Cargo,* 15 CIT at 542, 779 F. Supp. at 176.

"Information," under the statute, is "construed to include whatever is reasonably necessary for proper appraisement or classification of the merchandise involved." *Detroit Zoological Soc'y v. United States,* 10 CIT 133, 138, 630 F. Supp. 1350, 1356 (1986). At the time of entry, Prosegur did not submit information on the manufacturer of the imported goods.[11] Nor does Prosegur claim to have provided this information. As such, Customs was unable to determine whether the subject merchandise was American Goods Returned. The manufacturer of the goods, in this case, was necessary to properly classify the merchandise. *See Mi-Scott Int'l, Ltd. v. United States,* 13 CIT 1046, 1047 (1989). Customs' extension of the time for liquidation was, therefore, justified.

B. *Classification of the Goods as Dutiable was a Mistake of Law*

1. Section 1520(c)

Generally Customs' decisions are considered "final and conclusive upon all persons * * * unless a protest is filed in accordance with" the ninety-day period set forth in section 1514(a) and (c). 19 U.S.C. §§ 1514(a), (c). Section 1520(c) is a limited exception to section 1514's protest procedures, used only to correct inadvertences in the filing. *See Chrysler Corp. v. United States,* 24 CIT ____, ____, 87 F. Supp. 2d 1339, 1347–48 n.8 (2000)("[A]lthough 'Congress clearly envisioned a liberal

[11] In the CF 29, Customs alerted Prosegur that "[b]ased on the entry documentation submitted, including the CF 3311, you have failed to substantiate that the articles being returned are '*U.S. Goods.*' You have indicated that you have no information on the manufacturer. Unless you comply with the entry requirements of section 10.1, your U.S. claim will be disallowed and the entry will be rate advanced." CF 29, at Def.'s Reply Mem. Supp. Mot. Summ. J., Ex. D (emphasis in original).

mechanism for the correction of inadvertences under section 1520(c)(1)', § 1520(c)(1) is nevertheless a narrow exception to the rule that a Customs classification decision is final unless a protest is filed within ninety days following liquidation.")(internal citations omitted). This section allows for reliquidation of an entry "[n]otwithstanding a valid protest was not filed," as long as reliquidation is requested within a year of liquidation. 19 U.S.C. § 1520(c); *but see ITT Corp.*, 24 F.3d at 1387 ("Section 1520(c)(1) [is not to be used to] afford a second bite at the apple to importers who fail to challenge Customs' decision within the [ninety] day period set forth in § 1514."). Under section 1520(c)(1), reliquidation is used to correct "a clerical error, mistake of fact, or other advertence * * * notamounting to an error in the construction of the law." 19 U.S.C. § 1520(c)(1).

Here, Prosegur argues that Customs committed a mistake of fact.[12] The distinction between a mistake of fact and error of law is clearly stated in our case law. Mistakes of fact are generally defined as mistakes that "take * * * place when some fact which indeed exists is unknown, or a fact which is thought to exist, in reality does not exist." *C. J. Tower & Sons, Inc. v. United States*, 336 F. Supp. 1395, 1399 (1972), *aff'd*, 499 F.2d 1277 (1974), *see also Executone Info. Sys. v. United States*, 96 F.3d 1383, 1386 (Fed. Cir. 1996). "Mistakes of law, on the other hand, occur where the facts are known, but their legal consequences are not known or are believed to be different than they really are." *Chrysler Corp.*, 24 CIT at ____, 87 F. Supp. 2d at 1344.

The court distinguishes between "decisional mistakes," which must be challenged under section 1514, and "ignorant mistakes," which are remediable under section 1520(c). *See, e.g., Id.* at ____, 87 F. Supp. 2d at 1347. "Decisional mistakes" are legal mistakes and occur when "a party makes the wrong choice between two known, alternative sets of facts." *Universal Coops., Inc. v. United States*, 13 CIT 516, 518, 715 F. Supp. 1113, 1114 (1989). In comparison, an "ignorant mistake" is one "in which a party is unaware of the existence of the correct, alternative set of facts." *Id.* In order for the goods to be reliquidated under 1520(c)(1), the alleged mistake of fact must be an ignorant mistake.

2. Application of 1520(c)

Customs argues that Prosegur's submission of a claim under section 1520(c) is an attempt to circumvent a failure to file a timely protest under section 1514 of Customs' classification decision. We agree. *See, e.g., ITT Corporation*, 24 F.3d at 1387 n.4 ("We emphasize that under no circumstances may the provisions of § 1520(c)(1) be employed to excuse the failure to satisfy the requirements of § 1514."). Prosegur disagrees with Customs' decision to classify the imported jewelry under subheading 7113.9, HTSUS, at 6.5% *ad valorem*. It is well settled, however, that a challenge to the classification of merchandise is an issue of law. *See*

[12] Therefore, it is unnecessary to consider whether Customs' actions amounted to a clerical error or other inadvertence in accordance with section 1520(c)(1).

Executone, 96 F.3d at 1387; *AT&T Int'l v. United States*, 18 CIT 721, 726, 861 F. Supp. 95, 100 (1994); *Universal Coops., Inc.*, 13 CIT at 518, 715 F. Supp. at 1114; *Occidental Oil & Gas Co. v. United States*, 13 CIT 244, 247 (1989); *Cavazos v. United States*, 9 CIT 628, 630 (1985).

Prosegur, in an attempt to characterize the classification of the goods under subheading 7113.19, HTSUS, as a mistake of fact, argues that "Customs did not know the merchandise was American Goods Returned at the time of liquidation." Complaint at ¶ 19. Prosegur supports this argument by claiming that, "[i]f Customs had doubts as to whether the merchandise qualified as American Goods, then the information they needed for making their classification decision could be obtained through a CF 28 or a CF 29[,]" and the record does not show that Customs ever requested such documentation. Pl.'s Mem. Opp'n to Mot. Part. Summ. J. at 8.

As previously discussed, the evidence supports a finding that Customs did notify Prosegur as to the deficiencies in its documents, even sending a CF 29. *See* CF 29, at Def.'s Reply Mem. Supp. Mot. Summ. J., Ex. D. Specifically, Customs informed Prosegur that its documentation did not indicate the manufacturer of the goods, making it impossible to classify the goods as American Goods Returned. *See id.* Prosegur has produced no evidence from which we could infer otherwise. Moreover, Customs knew that Prosegur was attempting to enter the goods as American Goods Returned. Nonetheless, because of Prosegur's limited documentation, Customs determined it had insufficient information to support classifying the goods as American Goods Returned.

Customs did not commit an ignorant mistake of fact, which is the case where "a party is unaware of the existence of the correct, alternative set of facts." *Chrylsler Corp.*, 24 CIT at ____, 87 F. Supp. 2d at 1347. Customs was aware of the alternative set of facts, i.e., Prosegur's claim that the goods were American Goods Returned. That Customs may have been wrong with regard to the underlying fact of the place of manufacture of the goods is irrelevant because the place of manufacture was not the basis for the decision. Rather, it was the failure of documentation that was the basis for the decision. Customs chose not to classify the goods as American Goods Returned, but rather to classify them as dutiable, because of the inadequacy of Prosegur's documentation. It is similarly irrelevant that Prosegur may have erred in failing to submit timely documentation of the American manufacturer. Prosegur's error was a failure to comply with CFR § 10.1, a mistake of law, not fact. As discussed in *Chrysler Corporation*, "although 'Customs may have been mistaken as to the correct state of the facts,' all relevant positions as to the facts were known by Customs prior to liquidation; thus creating an error in the construction of a law which cannot be challenged under § 1520(c)(1)." *Chrysler Corporation*, 24 CIT at ____, 87 F. Supp. 2d at 1346.

In this case all relevant claims as to the facts were known by Customs prior to liquidation. Therefore, Prosegur's claimed classification was

denied, not because of a mistake of fact, but because of Prosegur's failure to prove that the merchandise was American Goods Returned in compliance with 19 C.F.R. § 10.1. *See, e.g., Occidental Oil,* 13 CIT at 248 (holding "that since the plaintiff did not supply the proper documentation, 'the appropriate customs officer made a legal determination as to the classification of the merchandise on the basis of the facts presented, and in light of plaintiff's claimed classification.'")(quoting Cavazos, 9 CIT at 631). Customs' classification of the goods is, therefore, appropriate.

CONCLUSION

For the foregoing reasons, Plaintiff's opposition to Defendant's motion for partial summary judgment is denied. Defendant's motion for partial summary judgment as to Court No. 95–10–01305 is granted.

(Slip Op. 01–51)

KAO HSING CHANG IRON & STEEL CORP., PLAINTIFF, AND ACI CHEMICALS, INC., ET AL., PLAINTIFF-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND WHEATLAND TUBE CO., DEFENDANT-INTERVENOR

Consolidated Court No. 00–01–00026

Plaintiff moved to amend administrative record to include its affidavits memorializing ex parte meeting with officials of United States Department of Commerce ("Commerce"). The United States Court of International Trade, Eaton, J., held that Commerce has a duty under 19 U.S.C. § 1677f(a)(3) (1994) to draft, and include in record of administrative proceeding, a record of ex parte meeting between Commerce and interested party during which factual information related to such proceeding was presented or discussed, such that failure to do so constitutes a reasonable basis for concluding that administrative record is incomplete.

[Plaintiff's motion granted.]

(Dated April 19, 2001)

Ablondi, Foster, Sobin & Davidow, P.C. (F. David Foster and *Kristen S. Smith),* for Plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General of the United States; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Velta A. Melnbrencis,* Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; of counsel: *Stephen M. DeLuca,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, for Defendant.

Schagrin Associates (Roger B. Schagrin), for Defendant-Intervenor.

MEMORANDUM OPINION AND ORDER

EATON, *Judge:* Plaintiff Kao Hsing Chang Iron & Steel Corporation ("Plaintiff") moves to amend the administrative record in this action challenging a final determination of the United States Department of

Commerce ("Commerce") with respect to an administrative review of the antidumping order covering certain circular welded carbon steel pipes and tubes from Taiwan. *See Certain Circular Welded Carbon Steel Pipes and Tubes From Taiwan: Final Results of Antidumping Duty Administrative Review,* 64 Fed. Reg. 69,488 (December 13, 1999). The court has exclusive jurisdiction over this action. *See* 28 U.S.C. § 1581(c) (1994); 19 U.S.C. § 1516a(a) (1994). For the reasons set forth below, the Court grants Plaintiff's motion.

BACKGROUND

This motion arises from an ex parte meeting held between Plaintiff's counsel and Commerce officials on March 23, 1999. It is undisputed that on that day, and at Plaintiff's request, Commerce officials who acted as case analysts and supervisors in the contested review, met with counsel for Plaintiff and discussed factual matters concerning Commerce's investigation. No other parties or their representatives were present. No memorandum or other record of the meeting was made by Commerce or included in the administrative record, which was filed on April 18, 2000. Thereafter, Plaintiff brought this motion, seeking to include in the record two affidavits memorializing the meeting of March 23, 1999.

Plaintiff contends that Commerce had an obligation pursuant to 19 U.S.C. § 1677f(a)(3) (1994) to memorialize, in writing, the ex parte meeting of March 23, 1999, and to include such written summary in the official record of the underlying administrative review. (Pl.'s Mem. Supp. Mot. Amend R. at 2.) Plaintiff further contends that Commerce's failure to do so constitutes a reasonable basis for concluding that the administrative record is incomplete. (*Id.* at 1–2.)

The United States ("Government"), on behalf of Commerce, claims that 19 U.S.C. § 1677f(a)(3) is inapplicable on its face, as neither the person charged with making the determination, i.e., the Secretary of Commerce, nor a person charged with making a final recommendation to that person, i.e., the Assistant Secretary or Deputy Assistant Secretary of Commerce, was present at the meeting. (Def.'s Mem. Opp'n to Mot. Amend R. at 4.) The Government argues that the statute does not require Commerce to maintain a record "each time that some Commerce official meets with interested parties or their counsel" (*id.* at 3), particularly in instances where, as here: (1) Commerce did not seek the meeting; and (2) the other interested parties, who were not present or represented at the meeting, have not objected to the lack of such a record. (*Id.* at 5.) Defendant-Intervenor Wheatland Tube Company ("Defendant-Intervenor") urges the denial of Plaintiff's motion on two additional grounds. First, Defendant-Intervenor claims that "[d]iscussion of legal issues or previously submitted factual data does not warrant preparation of an *ex parte* meeting memorandum." (Def.-Intervenor's Mem. Opp'n to Mot. Amend R. at 2.) Second, Defendant-Intervenor asserts that the information Plaintiff seeks to place in the record should have been the subject of questionnaire responses. (*Id.* at 3.)

DISCUSSION

In the context of a challenge to a final administrative determination rendered under 19 U.S.C. § 1675(a)(1), judicial review is typically limited to the administrative record. *See Saha Thai Steel Pipe Co. v. United States*, 11 CIT 257, 259, 661 F. Supp. 1198, 1201 (1987). The administrative record is defined broadly by 19 U.S.C. §1516a(b)(2)(A) as copies of "all information presented to or obtained by the Secretary, [or] the administering authority, * * * during the course of the administrative proceeding, including * * * the record of ex parte meetings required to be kept by section 1677f(a)(3) of this title." 19 U.S.C. §1516a(b)(2)(A)(i); *see also* 19 C.F.R. § 351.104(a)(1) (1999) ("The official record will include government memoranda pertaining to the proceeding, memoranda of *ex parte* meetings, determinations, notices published in the Federal Register, and transcripts of hearings."). Section 1677f(a)(3), in turn, defines the statutory duty to record ex parte meetings as follows:

> (3) Ex Parte meetings
>
> The administering authority * * * shall maintain a record of any ex parte meeting between—
>
> (A) interested parties or other persons providing factual information in connection with a proceeding, and
>
> (B) the person charged with making the determination, or any person charged with making a final recommendation to that person, in connection with that proceeding,
>
> if information relating to that proceeding was presented or discussed at such meeting.

19 U.S.C. § 1677f(a)(3); *see also Nippon Steel Corp. v. United States*, 24 CIT ____, ____, 118 F. Supp. 2d 1366, 1373 (2000) (and cases cited therein). "A court will only consider matters outside of the administrative record when there has been a '*strong showing* of bad faith or improper behavior on the part of the officials who made the determination' or when a party demonstrates that there is a '*reasonable basis* to believe the administrative record is incomplete.'" *F.lli De Cecco di Filippo Fara San Martino S.P.A. v. United States*, 21 CIT 1124, 1126, 980 F. Supp. 485, 487 (1997) (citing *Saha Thai*, 11 CIT at 259, 261, 661 F. Supp. at 1201–02). Here, Plaintiff does not allege bad faith or improper behavior on the part of Commerce officials, but, rather, contends that the record is incomplete due to Commerce's failure to maintain a record of the ex parte meeting of March 23, 1999. Thus, the question presented is whether the failure of Commerce to make and include in the administrative record a record of an ex parte meeting between Commerce officials and an interested party, during which it is undisputed that factual information related to the relevant proceeding was presented or discussed, constitutes a reasonable basis for determining that the administrative record is incomplete. The Court concludes that it does.

Both section 1677f(a)(3), and the case law construing it, compel the conclusion that Commerce was required to make a memorandum of the March 23, 1999 meeting, and to include such memorandum in the re-

cord for review. First, the assertion that neither the Secretary of Commerce; the Assistant Secretary of Commerce; nor the Deputy Assistant Secretary of Commerce was present does not relieve Commerce of its duty to make a record. Such proposition would have the Court disregard the actual manner in which Commerce conducts these investigations, and would give a meaning to the statute so constricted as to defeat Congress's intention to "insure that all parties to the preceeding [sic] are more fully aware of the presentation of information to the administering authority." S. Rep. No. 96–249, at 100 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 486; *see also Nippon Steel*, 24 CIT at ___, 118 F. Supp. 2d at 1374 (noting that Commerce's failure to fulfill its statutory obligation undermined legislative "goal of transparency"). The Government's argument that, in the absence of the Secretary, either the Assistant Secretary or Deputy Assistant Secretary must be present in order to trigger application of the statute, asks the Court to give greater dignity to the movement of documents than to the actual drafting and presentation of recommendations. The heart of this inquiry, however, lies not in the titles of agency officials but in their roles. *See Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 37 (N.D. Tex. 1981) ("[T]he focus of inquiry into record definition is how the agency actually functions in its decision-making, not the labels attached to the stages of its decisional processes."). In point of fact, the Commerce officials who attended the ex parte meeting of March 23, 1999 were those charged with the conduct of the investigation from the time of its inception. *See, e.g.*, Theodore W. Kassinger & Rosemary E. Gwynn, *Law & Practice of United States Regulation of International Trade, Antidumping Duty Investigations* 28, 30 (Charles R. Johnston, Jr., ed., 1996) ("Upon initiation of [a] case, Commerce * * * will assign a supervisor and case handlers to the investigation. * * * As a matter of practice, there is in any case frequent contact between the agencies' case handlers and representatives of the parties."); *see also De Cecco*, 21 CIT at 1128–29, 980 F. Supp. at 489 ("In reality, unfair trade investigations are conducted by staff people at Commerce and not by the person making the final determination."). Indeed, the court in *De Cecco*, after making similar observations, rejected this line of reasoning. *See id.* The Government's argument is then unconvincing because, for all practical purposes, the Commerce officials present at the March 23, 1999 meeting made the final recommendations with respect to the investigation.

Second, the subject matter discussed at the March 23, 1999 meeting clearly falls within the ambit of section 1677f(a)(3). The statute expressly provides that a memorandum must be made, and included in the record, "if information relating to th[e] proceeding was presented or discussed at such meeting," 19 U.S.C. § 1677f(a)(3), and makes specific reference to parties or persons "providing factual information in connection with [the] proceeding." *Id.* Neither the Government nor Defendant-Intervenor disputes that factual information was presented at this meeting. Moreover, whether the factual information was previously

submitted, or should have been submitted to Commerce via responses to questionnaires, is immaterial to Commerce's statutory obligation. *Cf. Nippon Steel*, 24 CIT at ____, 118 F. Supp. 2d at 1374. As the court in *Nippon Steel* recently noted:

> Commerce is not entitled to choose which covered *ex parte* meetings it will memorialize, based on its own identification of redundancies. Parties are entitled to know when and how information was conveyed; they should not have to rely on the subtle judgments by Commerce officials or employees about whether factual information is important, is already in the record in some other form, or is even useful to the agency or to the parties.

Id., 24 CIT at ____, 118 F. Supp. 2d at 1373; *see also Policy Statement Regarding Issuance of Ex Parte Memoranda*, 66 Fed. Reg. 16,906, 16,906 (March 28, 2001) (instructing "[a]ll Import Administration staff" that ex parte "memoranda are required whether or not the factual information received was received previously, is expected to be received later in the proceeding, or is expected to be used or relied on.").

Finally, attempts by the Government and Defendant-Intervenor to distinguish the situation here from that in *De Cecco* are unavailing. For example, the Government and Defendant-Intervenor contend it to be significant that Plaintiff, and not Commerce, initiated the ex parte communication. (Def.'s Mem. Opp'n to Mot. Amend R. at 4–5; Def.-Intervenor's Mem. Opp'n to Mot. Amend R. at 5.) The statute, of course, makes no distinction with respect to which entity initiates contact. Moreover, the Government's argument is undercut by Commerce having drafted, and included in the record (*see* Pl.'s Reply Mem. Supp. Mot. Amend R., Ex. 1), a memorandum memorializing another ex parte communication initiated by Plaintiff, i.e., a March 29, 1999 telephone call between counsel for Plaintiff and a case analyst. *Cf. De Cecco*, 21 CIT at 1129, 980 F. Supp. at 489 (finding it inconsistent for Commerce to argue that there existed no need to place in the record summary of ex parte communications in which neither the Assistant Secretary nor Deputy Assistant Secretary had participated, as Commerce had done so for similar communications). Likewise, the statute does not excuse Commerce from its duty merely because adverse parties, who were not present at the meeting, have made no objection to the absence of such a memorandum in the record. The legislative history indicates that section 1677 was drafted to "provide[] the maximum availability of information to interested parties." S. Rep. No. 96–249, at 100, *reprinted in* 1979 U.S.C.C.A.N. at 486. Nowhere in the legislative history is it suggested that, in order for a memorandum of an ex parte communication to be included in the record, an interested party must demand that such memorandum be included. To the contrary, the legislative goal is to avoid the situation where parties not in attendance at an ex parte meeting would have to seek out and discover its occurrence, and then demand to know what had transpired in their absence. *See id.* Defendant-Intervenor also argues that, unlike the movant in *De Cecco*, Plaintiff failed to contact Com-

merce when it realized that there existed no memorandum of the ex parte meeting in the administrative record. Rather, Defendant-Intervenor contends, Plaintiff "simply created its own evidence—affidavits not prepared contemporaneously with the meetings." (Def.-Intervenor's Mem. Opp'n to Mot. Amend R. at 5.) The statute, however, does not place on Plaintiff the burden of requesting that a record of an ex parte meeting be made. The obligation to create such a record rests with Commerce, not Plaintiff. Because Commerce failed in its duty, and because it has raised no questions going to the accuracy of the record made by Plaintiff's counsel, the record shall be supplemented with Plaintiff's proposed affidavits. *Cf. De Cecco,* 21 CIT at 1129, 980 F. Supp. at 489 (denying government's motion to strike from plaintiff's brief in support of its motion for judgment on agency record plaintiff's affidavits recording ex parte telephone conversations, a record of which Commerce had failed to maintain and include in the record).

CONCLUSION

The Court has considered the parties' remaining arguments and finds them to be without merit. Thus, for all of the foregoing reasons, it is hereby

ORDERED that Plaintiff's unopposed Motion for Leave to Reply to Defendant's and Defendant-Intervenor's Opposition to Plaintiff's Motion to Amend the Administrative Record is granted; and it is further

ORDERED that Plaintiff's Motion to Amend Administrative Record is granted; and it is further.

ORDERED that the affidavits of Johnny Chiu and F. David Foster, included as Attachment 5 to Plaintiff's Motion for Judgment on the Agency Record Pursuant to USCIT Rule 56.2, shall be included in the record for review of the underlying administrative proceeding.

[PUBLIC VERSION]

(Slip Op. 01–52)

NIPPON STEEL CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND BETHLEHEM STEEL CORP., U.S. STEEL GROUP, A UNIT OF USX CORP., ISPAT INLAND INC., LTV STEEL CO., INC., GALLATIN STEEL, IPSCO STEEL, INC., STEEL DYNAMICS, INC., AND WEIRTON STEEL CORP., DEFENDANT-INTERVENORS

BETHLEHEM STEEL CORP., U.S. STEEL GROUP, A UNIT OF USX CORP., ISPAT INLAND INC., AND LTV STEEL CO., INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND NIPPON STEEL CORP., DEFENDANT-INTERVENOR

Consolidated Court No. 99–08–00466

[ITA Remand Determination Remanded.]

(Dated April 20, 2001)

Gibson, Dunn & Crutcher LLP (Daniel J. Plaine, Gracia M. Berg, Merritt R. Blakeslee, and *Seth M. M. Stodder)* for plaintiff Nippon Steel Corporation.

Skadden, Arps, Slate, Meagher & Flom LLP (Robert E. Lighthizer and *John J. Mangan)* for plaintiffs Bethlehem Steel Corporation, U.S. Steel Group, a unit of USX Corporation, Ispat Inland, Inc. and LTV Steel Company, Inc.

Stuart E. Schiffer, Acting Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Kyle E. Chadwick), John D. McInerney, Elizabeth C. Seastrum,* and *Linda S. Chang,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Schagrin Associates (Roger B. Schagrin) for defendant-intervenors Gallatin Steel, IPSCO Steel, Inc., Steel Dynamics, Inc. and Weirton Steel Corp.

OPINION

RESTANI, *Judge:* This challenge to *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan,* 64 Fed. Reg. 24,329 (Dep't Comm. 1999) (final admin. rev.) *["Final Results"]* is before the court following a remand determination ("Remand Determ.") by the United States Department of Commerce ("Commerce" or "the Department"). Plaintiff Nippon Steel Corporation ("NSC"), one of the respondents in the underlying antidumping duty investigation, argues that (1) the Department has failed to implement properly this court's injunction regarding the placement on record of memoranda on *ex parte* meetings, and (2) the Department continues to rely impermissibly on adverse facts available without adequately supporting the requisite finding that NSC "failed to cooperate by not acting to the best of its ability." 19 U.S.C. § 1677e(b) (1994). Familiarity with the opinion ordering remand is presumed. *See Nippon Steel Corp. v. United States,* 118 F. Supp. 2d 1366 (Ct. Int'l Trade 2000) *("Nippon I").*

I. *Ex Parte Meetings*

In its earlier opinion, the court found that Commerce violated 19 U.S.C. § 1677f(a)(3) because the Department had failed to place in the

administrative record any memoranda recording the agency's *ex parte* meetings with petitioners. *See id.* at 1372–74. The court therefore ordered the Department to

> issue instructions that *ex parte* memoranda required by 19 U.S.C. § 1677f(a)(3) will be drafted expeditiously in all cases, reviewed by a person in attendance at the meeting, and placed in the record as soon as possible, so that parties may comment effectively on the factual matters presented. The memoranda are required whether or not the factual information received was received previously, is expected to be received later in the proceedings, or is expected to be used or relied on.

Id. at 1374. Commerce attempted to comply with this court's injunction by circulating a policy statement on *ex parte* memoranda to Import Administration staff. *See* Def.'s Reply Br. at 13 & Attach. Because that statement was not published and apparently failed to include all the stated elements of the court's instruction, NSC challenged the Department's policy statement as inconsistent with the court's injunction. The court subsequently issued an Order to Show Cause as to why the Assistant Secretary for Import Administration should not be held in contempt for not obeying in full the court's injunction. At the show cause hearing on February 15, 2001, while maintaining that the injunction had been obeyed, representatives from the Department agreed to comply more fully with the court's injunction and to take additional measures to ensure that all Commerce officials were aware of their statutory obligations under 19 U.S.C. § 1677f(a)(3).

On March 28, 2001, the Department published in the Federal Register a revised policy statement. *See Policy Statement Regarding Issuance of Ex Parte Memoranda,* 66 Fed. Reg. 16,906 (Dep't Comm. 2001). This policy statement is also available on the Web site of the International Trade Administration, at http://ia.ita.doc.gov/policy/ex-parte-memo.htm. Upon reviewing the Department's statement, the court finds that the agency has complied with the court's injunction in *Nippon I.*

II. Use of Adverse Facts Available

A cooperating respondent's failure simply to respond completely or correctly to the Department's *initial* request for specific information does not warrant resort by the agency to facts otherwise available under 19 U.S.C. § 1677e(a)(2)(B). *See* 19 U.S.C. §§ 1677e(a); 1677m(d). *See also Ta Chen Stainless Steel Pipe, Inc. v. United States,* No. 97–08–01344, 1999 WL 1001194, at *17 (Ct. Int'l Trade 1999) *("Ta Chen I").* If a cooperating respondent fails to respond adequately to Commerce's *supplemental* request for information, the Department may then use facts otherwise available in lieu of missing or incomplete data. *See* 19 U.S.C. §§ 1677e(a); 1677m(d). *See also NTN Bearing Corp. v. United States,* No. 97–10–01801, 2001 WL 180255, at *7 (Ct. Int'l Trade 2001); *SKF USA Inc. v. United States,* 116 F. Supp. 2d 1257, 1268 (Ct. Int'l Trade 2000). "Once Commerce has determined under 19 U.S.C. § 1677e(a) that it may resort to facts available, it must make additional findings

prior to applying 19 U.S.C. § 1677e(b) and drawing an adverse inference." *Ferro Union, Inc. v. United States*, 44 F. Supp. 2d 1310, 1329 (Ct. Int'l Trade 1999) *("Ferro Union I")*.[1] Where, as here, a respondent gives an incorrect response to one of the Department's requests for information in an original and one supplemental questionnaire, such error may justify reliance on facts otherwise available under 19 U.S.C. § 1677e(a)(2)(B), but does not suffice, in the absence of further evidence, to permit an adverse inference to be drawn against the respondent. *See Nippon I*, 118 F. Supp. 2d at 1377–79.

The Department, therefore, must cite factors beyond NSC's failure to respond correctly to the agency's two requests for the weight conversion factor. In its remand determination, Commerce attempts to support its application of adverse facts available against NSC with the following observations: (1) NSC has had significant experience with antidumping proceedings; (2) NSC provided "incorrect" responses when the Department asked repeatedly for the weight conversion factor because NSC failed to make the requisite internal inquiries to retrieve the requested information; and (3) the weight conversion factor was within NSC's control, and NSC was therefore fully capable of complying with the Department's requests. Because these observations still do not support a finding that NSC's actions rose above "a simple mistake," *id.* at 1379, the Department's determination is unsupported by substantial evidence.

A. Evidence Cited by Commerce to Support the Use of Adverse Facts Available

First, NSC's status as "one of the most successful and sophisticated steel companies in the world [with] significant prior experience with dumping proceedings," Remand Determ. at 3, is irrelevant to whether NSC acted to the best of its ability in this case. This is not a case where the Department points to the respondent's prior participation in dumping proceedings as a basis for rejecting data that fails to satisfy the Department's procedures or standards for the submission of data.[2] Nor is this a case where the Department highlights an error made by the respondent in a previous review and which the respondent continues to make in the current review, as evidence of the respondent's unwillingness to comply with the Department's requests for information.[3] Rather, Commerce here seeks to base its evaluation of NSC's failure to submit a weight conversion factor, in part, on NSC's experience as a respondent in dumping proceedings. A generalized familiarity with anti-

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[1] *See also Mannesmannrohren-Werke AG v. United States*, 77 F. Supp. 2d 1302, 1315–16 (Ct. Int'l Trade 1999) *("Mannesmann I")*; *Borden, Inc. v. United States*, 4 F. Supp. 2d 1221, 1246–47 (Ct. Int'l Trade 1998) *("Borden I")*, *rev'd on other grounds*, No. 99–1575, 2001 WL 312232 (Fed. Cir. Mar. 12, 2001).

[2] *Cf. Heveafil Sdn. Bhd. v. United States*, No. 98–04–00908, 2001 WL 194986, at *4 (Ct. Int'l Trade 2001) (rejecting documentation submitted during verification because it was not "maintained in the ordinary course of business"); *Gourmet Equip. (Taiwan) Corp. v. United States*, No. 99–05–00262, 2000 WL 977369, at *4–5 (Ct. Int'l Trade 2000) (rejecting submission of unverifiable data).

[3] *Cf. Chrome-Plated Lug Nuts from Taiwan*, 64 Fed. Reg. 17,314, 17,316 (Dep't Comm. 1999) (final admin. rev.) ("Gourmet has been aware of, but has not corrected, deficiencies in its accounting system even though these deficiencies caused the Department to use facts available for the last several administrative reviews."), *aff'd, Gourmet Equip.*, 2000 WL 977369, at *4–5.

dumping proceedings, however, cannot support a finding that NSC did not cooperate to the best of its ability because it failed to provide the answer to one esoteric question posed by the Department.[4] In this facts available context, generic experience as a respondent offers no insight into NSC's actions during the current proceeding. The department has not shown, for example, that the inadvertence claimed in this case also occurred in another review, or that the specific element focused on in a previous review (e.g., weight conversion factor, major input valuation) is also at issue in this case. To allow the Department to draw detailed conclusions about respondent because of its generalized knowledge would improperly penalize now those firms that had been the subject of antidumping actions previously.

Second, in reiterating NSC's failure to provide the weight conversion factor, the Department conflates the prerequisites for use of facts available with the additional findings necessary to warrant an adverse inference. *See* Remand Determ. at 4–5 (citing respondent's inaccurate responses to original and supplemental questionnaire as support for adverse inference); Def.'s Reply Br. at 6 (same). Commerce's reasoning in this regard is encapsulated in the following paragraph from the Remand Determination:

> A "reasonable respondent," acting to the "best of its ability" to comply with the Department's request for [weight conversion factors], would minimally have contacted the factory, where the steel coils were produced and where weighing was most likely to take place, to determine whether they were weighed and the weight data maintained. A "reasonable respondent" would have attempted to obtain the data when it was first requested, or at least when it was requested for the second time, rather than telling the Department, without any factual basis to support such a claim, that the respondent did not believe the Department needed the information. With respect to this issue, NSC was not acting as a "reasonable respondent" nor was it acting "to the best of its ability," as required by the statute.

Remand Determ. at 5. In other words, according to the Department, NSC did not respond accurately or in a timely fashion to the Department's questionnaire[5] because the company did not make the proper inquiries of its factory employees, and this error reflects NSC's failure to act "to the best of its ability." The fact that NSC did not make appropriately timely submissions as a result of inadequate inquiries, however,

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[4] *See Taiwan Semiconductor Indus. Ass'n v. United States*, 105 F. Supp. 2d 1363, 1379 (Ct. Int'l Trade 2000) (agency determination not sustained where agency "failed to articulate a 'rational connection between the facts found and the choice made'") (citations omitted).

[5] NSC claims that the Department did not properly request the correct weight conversion data in its supplemental questionnaire. In particular, NSC notes that the Department requested the weight conversion factors "in [NSC's] *home market sales listing*." NSC Obj. at 4 n.1 (quoting Supplemental Questionnaire, Field 16.1 (emphasis added)). The relevant weight conversion data necessary for the Department to perform its comparison, however, was for NSC's *U.S. sales*. Because Commerce's adverse inference was based on the lack of weight conversion data for *U.S. sales*, which the agency had only requested in its original questionnaire, NSC seems to suggest that the Department had not properly sought the information from NSC before applying adverse facts available. Because NSC failed to raise this argument in its original pleadings in this action, and appears to have failed to raise it at the agency level, the court does not address this argument.

only provides sufficient basis for the use of facts available pursuant to 19 U.S.C. § 1677e(a)(2)(B). The Department's explanation for its adverse inference is thus merely a more detailed restatement of the finding[6] that NSC "fail[ed] to provide [necessary information] by the deadlines for submission." 19 U.S.C. § 1677e(a)(2)(B). Commerce may not in this manner "simply repeat[] its 19 U.S.C. § 1677e(a)(2)(B) finding, using slightly different words," in lieu of making the requisite additional findings before drawing an adverse inference. *Borden I*, 4 F. Supp. 2d at 1246. *See also Ferro Union I*, 44 F. Supp. 2d at 1329–31.

Third, Commerce emphasizes the existence of the requested weight conversion data at NSC's factories as further evidence in support of the agency's adverse inference. The Department is undoubtedly correct that, as the court has noted previously, "it is reasonable to charge a respondent with full knowledge of its own operations." Def.'s Reply Br. at 6 (citing *Mannesmannrohren-Werke AG v. United States*, 120 F. Supp. 2d 1075, 1083 (Ct. Int'l Trade 2000) *("Mannesmann II")*). The failure to provide information otherwise readily available within the scope of a respondent's business operations may be relevant to determining a respondent's threshold *ability to comply* with its statutory obligations. *Mannesmann II*, 120 F. Supp. 2d at 1083. Nevertheless, this does not explain whether a respondent may have committed an excusable inadvertence or failed to act as a reasonable respondent should.

In the absence of additional evidence supporting a finding that a respondent "failed to cooperate by not acting to the best of its ability," where a claim of inadvertence is at issue, the simple fact of a respondent's failure to report information within its control does not warrant an adverse inference.[7] The court in *Mannesmann II* upheld the Department's resort to adverse facts available in the context of other, more revealing factors: the Department had provided Mannesmann with an original and *two* supplemental questionnaires, *id.* at 1078; respondent had offered answers that were non-responsive (i.e., unverifiable, in the wrong form, incomplete) to *four* questions in the course of addressing those requests for information, thereby establishing a "pattern of unresponsiveness," *id.* at 1077–80, 1084–87; and additional evidence strongly indicating a specific intent on the part of the respondent to evade the Department's requests for information.[8] This case, in contrast, presents no such additional probative factors to support Commerce's finding

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[6] NSC does not contest the propriety of this finding or the Department's reliance on (non-adverse) facts available. While Commerce could have waived the deadline and accepted the information, it was not required to do so. Commerce remains free to use NSC's data or other non-adverse data, as it deems appropriate.

[7] *Cf. Ta Chen Stainless Steel Pipe, Inc. v. United States*, No. 97-08-01344, 2000 WL 1225799, at *2-3 (Ct. Int'l Trade 2000) *("Ta Chen II")* (adverse inference upheld where, in addition to respondent's having access to data requested from affiliate, Commerce noted that respondent had provided other confidential data from affiliate, and that respondent did not fulfill its responsibility to maintain records relevant to administrative review).

[8]

Specifically, Commerce noted (1) that the respondent sought to re-frame the question posed by the Department through selective reference to the questionnaire's definition section, and (2) that an official working for the respondent acknowledged facts that were patently inconsistent with certain questionnaire responses, and the same official admitted that he had been involved in the preparation of those questionnaire responses. *See Mannesmann II*, 120 F. Supp. 2d at 1078–79.

that NSC's actions "constitute[] anything more than an inadvertent error." Mannesmann I, 77 F. Supp. 2d at 1316.[9]

In justifying its conclusion that NSC had "failed to cooperate by not acting to the best of its ability," Commerce has insufficiently explained how NSC's actions fall "below the standard for a reasonable respondent." *Nippon I,* 118 F. Supp. 2d at 1379.[10] The record reveals that NSC made significant efforts throughout the investigation to satisfy the Department's requests for information, producing voluminous submissions within the narrow time frame of the investigation. NSC's efforts must also be viewed in the context of what the Department recognized as a difficult case raising "unique and complex issues." Respondent Selection Mem. (Oct. 30, 1998), at 3, P.R. Doc. 62. Admittedly, NSC failed to provide Commerce with the weight conversion factor at the time requested, despite having the information within the company's control. Nevertheless, when NSC did provide the weight conversion data, ten days after issuance of the preliminary results, its delay was not so great as to hinder the progress of the investigation. *Cf. Roller Chain, Other Than Bicycle from Japan,* 63 Fed. Reg. 63,671, 63,674–75 (Dep't Comm. 1998) (final admin. rev.) (finding continuous errors made by respondent throughout investigation, "the magnitude of which prevented the Department from using [respondent's] information in the margin calculations").

In cases where a respondent claims an *inability* to comply with the agency's requests for information, the Department may permissibly draw an adverse inference upon a reasonable showing that the respondent, in fact, could have complied. *See, e.g., Ta Chen II,* 2000 WL 1225799, at *3; *Kawasaki Steel Corp. v. United States,* 110 F. Supp. 2d 1029, 1036–38 (Ct. Int'l Trade 2000). Here, however, where the respondent acknowledges the ability to comply, but claims it did not do so because of simple inadvertence, the Department must show more. As the court observed in its opinion ordering remand, those cases that do not suggest willfulness on the part of the respondent pose particular challenges for the Department to draw appropriate lines in order to deter-

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[9] In a supplemental filing, NSC urged this court to consider the recent decision of a WTO dispute settlement panel. The decision arose from the instant underlying investigation and addressed the same challenge to the Department's use of adverse facts available raised by NSC in this case. *See United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan,* WT/DS184/R, at ¶¶ 7.31–7.57 (Feb. 28, 2001), *available at* http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm. The court does not find the reasoning of the WTO panel relevant to the issue here. The WTO panel held that, under the relevant WTO law, an investigating authority may not refuse to consider untimely submitted factual information, provided that the information was submitted with sufficient time to allow for verification of the new data. *See id.* at ¶ 7.55. As a result, the panel found that the Department should not have resorted to facts available at all, but instead, should have relied on the late data in calculating NSC's dumping margin. *See id.* at ¶ 7.57. Whatever the merits of this holding in light of WTO rules, it plainly contradicts the applicable statute, which permits the agency to employ at least non-adverse facts available under these circumstances. *See* 19 U.S.C. § 1677e(a)(2)(B). *See also Nippon I,* 118 F. Supp. 2d at 1377 (citing *Seattle Marine Fishing Supply Co. v. United States,* 12 CIT 60, 71, 679 F. Supp. 1119, 1128 (1988)). The panel decision therefore has no bearing on the propriety of the Department's resort beyond facts available to the drawing of an adverse inference.

[10] Commerce rejects this standard and seeks to apply a pure "ability to comply" standard, but a completely errorless investigation is simply not a reasonable expectation. Even the most diligent respondents will make mistakes, and Commerce must devise a non-arbitrary way of distinguishing among errors. *See F. Lli De Cecco Di Filippo Fara San Martino S.p.A. v. United States,* 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("Commerce's discretion [when drawing adverse inferences] is not unbounded."). *See also Bowe-Passat v. United States,* 17 CIT 335, 343 (1993) ("This predatory 'gotcha' policy does not promote cooperation or accuracy or reasonable disclosure by cooperating parties intended to result in realistic dumping determinations.").

mine whether to draw an adverse inference. *See Nippon I,* 118 F. Supp. 2d at 1378–79. Perhaps in light of such challenges, the Department has understandably resisted attempts to establish definitive rules, proceeding instead to make "[t]he determination of whether a company has acted to the best of its ability * * * on a fact- and case-specific basis." *Antidumping Duties; Countervailing Duties,* 62 Fed. Reg. 27,296, 27,340 (Dep't Comm. 1998) (final rule). In doing so, however, the Department risks the appearance of acting arbitrarily as to when it forgives respondents and when it penalizes them.[11] This the Department cannot do. *See Olympic Adhesives, Inc. v. United States,* 899 F.2d 1565, 1572 (Fed. Cir. 1990) (quoting *Atlantic Sugar, Ltd. v. United States,* 744 F.2d 1556, 1560 (Fed. Cir. 1984)) ("[T]he ITA has not been given power that can be 'wielded' arbitrarily as an 'informal club.'"). Commerce should therefore seek greater coherence and consistency in its application of adverse facts available against respondents claiming simple error.

B. Impact on NSC's Dumping Margins

Finally, the parties dispute the relevance of any impact the missing weight conversion data may have had on NSC's final margin calculations.[12] Commerce argues that it is precluded from evaluating the effects of the missing data because, pursuant to 19 C.F.R. § 351.104(a) (2000),[13] the untimely submission of NSC's weight conversion factor was not a part of the record before the agency and therefore may not serve as a basis for the Department's decision on adverse inferences. *See* Remand Determ. at 9 & n.3; Def.'s Reply Br. at 11–12. The Statement of Administrative Action, however, dictates otherwise:

> Where a party has not cooperated, Commerce and the Commission may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. In employing ad-

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[11] *Compare Stainless Steel Bar from India,* 65 Fed. Reg. 3662, 3664–65 (Dep't Comm. 2000) (final new shipper rev.) (refusing to apply adverse facts available where respondent provided untimely data because data was verifiable, complete, easily usable, and respondent "misunderstood" reporting instructions), *and Circular Welded Non-Alloy Steel Pipe from the Republic of Korea,* 63 Fed. Reg. 32,833, 32,837 (Dep't Comm. 1998) (final admin. rev.) (refusing to apply adverse facts available where respondent provided untimely data because errors "affect[ed] only a minuscule number of transactions and appear[ed] to be inadvertent"), *with Final Results,* 64 Fed. Reg. at 24,360–61 (applying adverse facts available despite verifiable and complete data submission, and minimal impact of error).

[12] In responding to this issue raised by NSC in its remand case brief, Commerce properly recognizes that "[i]nformation necessary to the calculation of an antidumping duty margin is important whether it raises or lowers the margin." Remand Determ. at 9. The relative importance of information sought by the Department, however, is separate from the possible benefit a respondent may have gained by failing (intentionally or inadvertently) to provide data needed by the agency. Requiring Commerce to examine whether a respondent would benefit from its errors does not undermine or contradict the importance the agency may reasonably ascribe to a particular piece of requested data.

[13] Section 351.104(a) of Title 19 of the Code of Federal Regulations provides, in relevant part, as follows:

> (1) * * * The Secretary will include in the official record all factual information, written argument, or other material developed by, presented to, or obtained by the Secretary during the course of a proceeding that pertains to the proceeding.
>
> * * * * * * *
>
> (2) *Material returned.*
>
> (i) The Secretary, in making any determination under this part, will not use factual information, written argument, or other material that the Secretary returns to the submitter.
>
> (ii) The official record will include a copy of a returned document, solely for purposes of establishing and documenting the basis for returning the document to the submitter, if the document was returned because:
>
> (A) The document, although otherwise timely, contains untimely filed new factual information * * *
>
> * * * * * * *
>
> (iii) In no case will the official record include any document that the Secretary returns to the submitter as untimely filed, or any unsolicited questionnaire response * * *.

> verse inferences, one factor the agencies will consider is the extent to which a party may benefit from its own lack of cooperation.

SAA, at 870, H.R. Rep. 103–316, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4199. This language reveals that Commerce is to utilize adverse facts available when the respondent's failure to cooperate may conceivably provide the respondent with a "more favorable result."[14] *Id.* The SAA states that the Department "will consider * * * the extent to which a party may benefit." *Id.* In requiring Commerce to undertake this consideration, the SAA apparently presupposes that the respondent could have somehow benefitted from its non-cooperation, for the Department is not to consider *whether* the respondent benefitted, but rather, the *extent* of that benefit.[15]

The SAA has been adopted by statute as "an authoritative expression by the United States concerning the interpretation and application of the [URAA] in any judicial proceeding in which a question arises concerning such interpretation or application."[16] 19 U.S.C. § 3512(d). Commerce may not circumvent the binding quasi-legislative requirements of the SAA by acting pursuant to the agency's regulatory prohibition against placing certain documents in the administrative record.[17] Therefore, to the extent that 19 C.F.R. § 351.104(a) limits the Department's ability to examine the impact of respondent's submission in cases involving possible reliance on adverse inferences, that regulation is not in accordance with law.[18]

The record indicates that NSC likely would have gained a meaningless benefit by its failure to submit the weight conversion factor.[19] The potential expected benefit is so low that no reasonable fact-finder would find it to be the motivation for NSC's action. Even if the Department had considered this factor, in conjunction with the agency's marginally informative observation that NSC possessed the requested data within its control, Commerce would have lacked substantial evidence to support its conclusion that NSC's error was more than an excusable inadvertence and that reliance on adverse facts available was therefore

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[14] Although the SAA foresees a respondent's achieving a "more favorable result" from its non-cooperation as a basis for the use of an adverse inference, the Department is not necessarily limited to using adverse inferences only when respondent's dumping margins would be reduced by respondent's actions. The Department may employ adverse inferences, notwithstanding the impact upon a respondent's margins, provided that Commerce explains how the respondent might receive some benefit as a result of its non-cooperation. For example, a party may be choosing the benefit of avoidance of expenses of cooperation. Commerce does not allege facts supporting such a scenario here.

[15] *Cf. Mannesmann I*, 77 F. Supp. 2d at 1323–24 (respondent's errors found to be *de minimis* because "errors in the figures [respondent] provided would have given it almost no advantage compared to the 'correct' figures calculated by Commerce," thereby warranting remand).

[16] *Cf.* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 515–16 (1989) (courts do not defer to agency interpretations of a statute where Congress includes a provision in the statute stating that courts should give no deference on issues of interpretation or application of statute).

[17] *See Alaskan Arctic Gas Pipeline Co. v. United States*, 831 F.2d 1043, 1050 (Fed. Cir. 1987) ("This court will not defer to an agency's interpretation of a statute or an agency's application of regulations promulgated pursuant to a statute if the agency action either 'contravenes clearly discernible legislative intent' or is otherwise unreasonable.") (citation omitted).

[18] In any event, because the Department is mandated by law to consider the impact of respondent's non-cooperation, the court may require Commerce to place the requisite documentation on the administrative record. *See Acciai Speciali Terni, S.p.A. v. United States*, 120 F. Supp. 2d 1101, 1104 (Ct. Int'l Trade 2000) (discussing *F. Lli De Cecco Di Filippo Fara San Martino S.p.A. v. United States*, 21 CIT 1124, 980 F. Supp. 485 (1997)).

[19] In terms of its dumping margin, NSC's benefit (as calculated by NSC and uncontested by Commerce and defendant-intervenors) amounted to [ ]. NSC Obj. at 11 n.2.

appropriate.[20] While it is true that "Commerce must necessarily draw some inferences from a pattern of behavior," *Borden II*, 1998 WL 895890, at *1, the agency is nevertheless "not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence *fairly* demands." *Pohang Iron & Steel Co. v. United States*, No. 98–04–00906, 1999 WL 970743, at *11 (Ct. Int'l Trade 1999) (quoting *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 378 (1998) (emphasis added)).

CONCLUSION

Commerce's recently-issued policy statement conforms to the requirements of the court's injunction regarding the placement on record of memoranda detailing *ex parte* communications between parties and Department officials. Commerce's determination that NSC "failed to cooperate by not acting to the best of its ability," however, is unsupported by substantial evidence. Because those factors relied upon by Commerce, from which a reasonable inference could be drawn, do not constitute substantial evidence for a conclusion that NSC's actions were more than an inadvertent error, the court does not remand this case for further examination of the adverse inference issue. Rather, the court remands this case with instructions to the Department to re-calculate NSC's dumping margin without utilizing adverse facts available, in accordance with this opinion.

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[20] Commerce also identifies NSC's submission of the weight conversion factor data within only ten days of the preliminary determination as additional support for the agency's use of adverse facts available. *See* Remand Determ. at 3; Def.'s Reply Br. at 7. The court fails to see, and the Department does not explain, exactly how the dispatch with which a respondent provides information that it failed to provide earlier evinces a respondent's failure to cooperate by not acting to the best of its ability. In fact, respondents should be encouraged to produce such information as soon as possible, for example, as in this case, before verification, so that the Department may more likely be able to incorporate the reliable data and thereby "determin[e] current margins as accurately as possible." *D & L Supply Co. v. United States*, 113 F.3d 1220, 1223 (Fed. Cir. 1997) (quoting *Rhone Poulenc, Inc., v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)). *See also Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1192–93 (Fed. Cir. 1993) ("One of the fundamental purposes of the rules is to induce the timely submission of information to assist the ITA in determining accurate dumping margins."). Undoubtedly, had NSC been unable to procure the necessary information for a much longer period of time, for example, until after verification, the Department would have referred to respondent's significant delay or unverifiable submission as further evidence to support the use of adverse facts available. *See, e.g., Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China*, 65 Fed. Reg. 12,202, 12,204–05 (Dep't Comm. 2000) (prelim. admin. rev.). Commerce may not apply its facts available methodology so as to place respondents who attempt to correct inadvertent errors in such a "catch-22" situation. *Silver Reed America, Inc. v. United States*, 12 CIT 910, 915, 699 F. Supp. 291, 295 (1988).

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